

COMMENT

# TAKE CARE THAT THE LAWS BE FAITHFULLY LITIGATED

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## INTRODUCTION

On February 23, 2011, Attorney General Eric H. Holder, Jr., pursuant to 28 U.S.C. § 530D,<sup>1</sup> sent a letter to Speaker of the House John A. Boehner to advise Congress that President Obama had instructed the Department of Justice (DOJ) to cease defending Section 3 of the Defense of Marriage Act

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<sup>1</sup> See 28 U.S.C. § 530D(a)(1)(A)(i) (2006) ("The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice . . . establishes or implements a formal or informal policy to refrain . . . from enforcing, applying, or administering any provision of any Federal statute . . . on the grounds that such provision is unconstitutional . . .").

(DOMA) in litigation challenging its constitutionality.<sup>2</sup> According to the letter, the federal definition of “marriage” as the “legal union between one man and one woman as husband and wife”<sup>3</sup> “violates the equal protection component of the Fifth Amendment” by discriminating on the basis of sexual orientation.<sup>4</sup> Attorney General Holder asserted that classifications based on sexual orientation—the standard for which has not yet been set by the Supreme Court—should receive heightened scrutiny, not rational basis review, as some courts have already held.<sup>5</sup> Noting the rarity of such a nondefense decision, Holder explained that the executive branch would continue to *enforce* DOMA until congressional repeal or “the judicial branch renders a definitive verdict against the law’s constitutionality.”<sup>6</sup>

In a press release, Speaker Boehner declared that “[t]he constitutionality of this law should be determined by the courts—not by the President unilaterally.”<sup>7</sup> The Speaker’s retort ignored the Attorney General’s explanation that “[e]xecutive agencies [would] continue to comply with Section 3 of DOMA,” because “[t]his course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.”<sup>8</sup>

In this Comment, I assess and suggest modifications for the framework under which Presidents decide not to defend statutes they view as unconstitutional under the equal protection component of the Fifth Amendment.<sup>9</sup> I argue that nondefense decisions based on equal protection principles should

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<sup>2</sup> Press Release, U.S. Dep’t of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Holder Letter], <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>3</sup> 1 U.S.C. § 7 (2006); *see also id.* (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife.”).

<sup>4</sup> Holder Letter, *supra* note 2.

<sup>5</sup> *See id.* (citing cases).

<sup>6</sup> *Id.*

<sup>7</sup> Press Release, Hon. John A. Boehner, Speaker, U.S. House of Representatives, Statement by House Speaker John Boehner (R-OH) Regarding the Defense of Marriage Act (Mar. 4, 2011), available at <http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=227372>.

<sup>8</sup> *See* Holder Letter, *supra* note 2.

<sup>9</sup> Throughout this Comment, my references to equal protection refer to the equal protection component of the Fifth Amendment first recognized in *Bolling v. Sharpe*. *See* 347 U.S. 497, 500 (1954) (holding that where states were prohibited from certain actions under the Equal Protection Clause, “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government”); *see also, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (explaining that “the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable” and citing cases standing for this principle).

be treated differently than those based on other considerations.<sup>10</sup> Specifically, when the President believes that the courts should apply heightened scrutiny where they currently do not, he has a duty not only to decline to defend the statute, but also to instruct the DOJ to argue this position before the courts. The modified framework that I ultimately offer for nondefense decisions incorporates considerations that target equal protection cases.

Throughout my argument, I seek to contribute to the nondefense dialogue by addressing two issues in particular. First, scholars and members of Congress have expressed concerns that President Obama's decision not to defend DOMA sets us on a slippery slope to further Executive power grabs. But my focus on equal protection, and later careful analysis of President Obama's decision, proves that these concerns are unfounded. The additional authority for deciding not to defend a statute like DOMA finds support in countermajoritarian principles and the balance of harm to individuals weighed against the value of respecting the separation of powers. The modifications I offer to Walter Dellinger's nonenforcement decisionmaking framework<sup>11</sup> adapt it from facilitating presidential nonenforcement decisions to informing presidential nondefense decisions; these modifications also help to cabin presidential nondefense decisions to equal protection violations or similarly weighty concerns by forcing the President to ask a series of questions, the answers to which should be provided to the courts and the public. Under—or at least influenced by—this framework, for instance, a President who disagreed with Congress about the constitutionality of the Affordable Care Act under the Commerce Clause would have little room to refuse to defend it.<sup>12</sup> The framework I suggest is grounded in reasons why

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<sup>10</sup> There is a robust literature on presidential nonenforcement and nondefense of arguably unconstitutional statutes, but scholars and government attorneys have not addressed whether perceived unconstitutionality based on equal protection principles—as opposed to some other constitutional value—should change the terms of the decision. See, e.g., Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 526 (2012) (“There is no principled, textual basis for why the OLC [the DOJ’s Office of Legal Counsel] exalts the Executive’s pet peeve, infringements on Executive power, above violations of freedom of speech or federalism.”); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1198–205 (2012) (arguing that the nondefense decision can be characterized as based on the level of doubt about the constitutionality of the provision or upon separation-of-powers principles, without addressing whether the underlying constitutional value matters).

<sup>11</sup> For a discussion of Dellinger’s framework, see *infra* Section I.B.

<sup>12</sup> My point is not that the President and DOJ can or cannot refuse to defend statutes in contexts beyond equal protection. Rather, such decisions will be less likely after additional considerations are weighed. It is likewise important to point out that the President’s choice is not a policy or a political choice. Policy may motivate a certain view or inquiry, but at most, policy helps bring to light a legal conclusion. Dellinger’s framework and my modifications make explicit that policy disagreement with a duly enacted statute, without more, is not a valid ground for nondefense.

equal protection nondefense decisions deserve greater solicitude, and adds to Dellinger's considerations the important idea that the President's nondefense might actually *influence* the Supreme Court in its ultimate judgment—not constitute that judgment itself. The model accounts for important separation-of-powers principles by recognizing both the primacy of judicial review, but also the influence of the Executive in going beyond mere prediction and instead helping guide the path of the case law.

Second, nondefense decisions should not be considered the same as nonenforcement decisions, regardless of whether scholars think that equal treatment of the two decisions is justified as a matter of theory or principle.<sup>13</sup> In this Comment, I offer some observations on the existence of the distinction and why it matters: it can both influence the President's initial decision and also be leveraged by the President and DOJ in important ways. Splitting the difference by deciding to enforce a law while refusing to defend it can help to balance important equal protection values with significant separation-of-powers concerns. As the ongoing DOMA litigation demonstrates, such a course of action might actually increase interbranch dialogue.

I begin in Part I with the necessary background for addressing any non-enforcement or nondefense decisions. I first consider the constitutional authority for nonenforcement and nondefense and observe that it is fairly settled that the President can refuse to defend a law that he views as unconstitutional, and recognized, even if over vigorous dissent, that he might choose not to enforce it. The issue then becomes how the President should make such a nondefense decision. I posit that Walter Dellinger's framework for deciding when the President can refuse to enforce a law, along with the relevant modifications that Dawn Johnsen has suggested (which together I call the "Dellinger/Johnsen framework"), serves as a useful starting point for answering this question.

In Part II, I address some of the relevant distinctions between non-enforcement and nondefense, and by examining and elaborating on the Dellinger and Johnsen frameworks, I show that they apply equally well, if not better, to nondefense decisions. I am concerned in particular with the observations that nondefense, more so than nonenforcement, respects the separation of powers, facilitates judicial review, and considers changed circumstances.

Then, in Part III, I observe that, while the President's authority not to defend a statute may vary, the equal protection context is a uniquely

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<sup>13</sup> See, e.g., Devins & Prakash, *supra* note 10, at 522 (arguing that Presidents should neither enforce nor defend laws they deem unconstitutional); see also *infra* note 71.

significant arena for presidential nondefense decisions. While Neal Devins and Saikrishna Prakash have argued that Article I of the Constitution does not support treating various constitutional values any differently for purposes of nondefense,<sup>14</sup> there *are* in fact significant reasons for viewing equal protection as deserving special treatment. I contend that where the President believes that courts, and ultimately the Supreme Court, should apply heightened scrutiny but nonetheless fears that the Court will instead underenforce the Constitution by applying rational basis review, he has an enhanced responsibility to alert the Court by not defending the objectionable statute. In this endeavor, I incorporate the underenforcement theories of scholars such as Larry Sager, as well as offer numerous examples of the Executive's historical influence on the Court. Finally, I present a modified model that incorporates these relevant factors bearing on equal protection analysis into the nondefense inquiry.

Part IV serves as a real-life example. I apply this modified model to President Obama's decision not to defend DOMA to illustrate how his decisionmaking process correctly addressed all of the prongs of this discretionary framework and, in the process, has respected the separation of powers by continuing to enable—and indeed soliciting—judicial resolution of DOMA's constitutionality.

### I. THE DELLINGER/JOHNSEN FRAMEWORK AND THE NONDEFENSE CONTEXT

President Obama was not the first to consider not defending a statute. In fact, he could have looked to a body of historical and scholarly thought on presidential decisions not to enforce arguably unconstitutional statutes. In 1994, Walter Dellinger, then serving as Assistant Attorney General for the DOJ's Office of Legal Counsel, addressed presidential nonenforcement of constitutionally objectionable statutes in his memorandum, *Presidential Authority to Decline to Execute Unconstitutional Statutes*.<sup>15</sup> The guidance therein serves as a workable framework for a President approaching the politically and legally challenging scenario of deciding whether, or how, to execute a law he sees as constitutionally infirm. Because Dellinger himself was not thinking or writing in a vacuum,<sup>16</sup> I begin by briefly describing the robust tradition of Executive nonenforcement behind the memorandum. I

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<sup>14</sup> Devins & Prakash, *supra* note 10, at 526.

<sup>15</sup> Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199-203 (1994) [hereinafter Dellinger Memorandum].

<sup>16</sup> See Devins & Prakash, *supra* note 10, at 518 (noting that "Walter Dellinger's 1994 opinion added several wrinkles" to preexisting thought on the issue).

then discuss Dellinger's framework. This tradition and Dellinger's framework provide important background considerations for the argument for why we should view the authority for presidential nondefense decisions as heightened when the statute is allegedly unconstitutional under the Fifth Amendment's equal protection guarantee.

#### A. *Can the President Decline to Enforce or Defend a Statute?*

The threshold question a President must consider when confronted with a statute he views as violating equal protection is whether, given the Constitution's command in what is known as the Take Care Clause that he "take Care that the Laws be faithfully executed,"<sup>17</sup> he can refuse to enforce or defend the statute at all. The answer is a qualified "yes," as the brief survey below of Supreme Court dicta, James Wilson's reasoning, presidential practice, and congressional acquiescence demonstrates.

While the Constitution does not expressly state that the President can decline to enforce or defend a constitutionally objectionable statute,<sup>18</sup> neither does it state that the Supreme Court has the power of judicial review. This observation underlies a legal theory known as "departmentalism," which contends that the Executive, as a coordinate branch of government, has the authority to independently interpret the Constitution and act accordingly.<sup>19</sup> Armed with this authority, several Presidents have declined

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<sup>17</sup> U.S. CONST. art. II, § 3, cl. 4.

<sup>18</sup> See Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 829 (1999) (explaining that while other officials take an oath to support the Constitution, the President "is its guarantor . . . he has special responsibilities to make certain that the Constitution survives his watch").

<sup>19</sup> See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 301 (1994) (asserting that "separation of powers does not mean equality of powers" and that it is the Executive's, as well as the Judiciary's, responsibility to assess the constitutionality of laws); see also Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 352 (1994) (arguing for a version of departmentalism taking into account "comparative institutional competence"); Dawn Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 108 (2004) (advocating "functional departmentalism," a "variation informed by past practice and the practical implications for our system of constitutional self-government"); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1032-33 (2004) ("Most theorists of departmentalism situate their analysis in the context of separation of powers . . . [and] . . . ask[] how the constitutionally assigned functions and distinctive interpretive capacities of the three branches of the federal government should be coordinated."); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 120 (1993) (positing that the executive branch should take into account its own—and different—institutional concerns when interpreting the Constitution).

to execute statutes they have found unconstitutional.<sup>20</sup> Whether the President is considering nonenforcement or nondefense, as a matter of constitutional design, he will be both checked and guided by political accountability rather than judicial authority<sup>21</sup>—at least as long as he makes public his nondefense decisions and the bases for them.

Some Supreme Court dicta—at least as Dellinger broadly read them—approve of nonenforcement in at least some circumstances.<sup>22</sup> Dellinger also marshaled the Framers' intent as support<sup>23</sup>: James Wilson, a delegate at the Constitutional Convention and later a Supreme Court Justice, reasoned that if the legislature "transgress[ed] the bounds assigned to it," not only would judges have the "duty to pronounce [the offending act] *void*," but so too could the President "shield himself, and refuse to carry into effect an act

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<sup>20</sup> See, e.g., Goldstein, *supra* note 18, at 809 ("Thomas Jefferson ordered government attorneys not to prosecute persons under the Sedition Act. Andrew Johnson violated the Tenure of Office Act on Constitution basis. When Woodrow Wilson ignored a statute that conditioned removal of postmasters on Senate approval, the Court held the measure *unconstitutional*. No [J]ustice even suggested Wilson had acted improperly in refusing to enforce a statute he thought unconstitutional."); see also Letter from Chief Justice Salmon P. Chase, Supreme Court of the United States, to Gerrit Smith (Apr. 19, 1868), in JACOB WILLIAM SCHUCKERS, *THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE* 577 (1874) ("[A]cts of Congress not warranted by the Constitution are not laws. . . . [W]here [a statute] directly attacks and impairs the Executive power confided to [the President] by the Constitution . . . the clear duty of the President [is] to disregard the law, so far at least as it may be necessary in order to bring the question of its constitutionality before the judicial tribunals.").

<sup>21</sup> See Neomi Rao, *The President's Sphere of Action*, 45 WILLAMETTE L. REV. 527, 536 (2009) ("If the President refuses to enforce a statute on constitutional grounds, there is little that Congress can do . . . [outside of] impeachment."). Instead, the checks on the President are political in nature. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 61 (2010) (discussing checks on the President and contending that "these checks are not primarily legal. . . . Rather legislators appeal to the court of public opinion, which in turn constrains the President"); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 113 (1999) ("[T]he President's *political* incentives lead him or her to act in a way consistent with constitutional values." (emphasis added)); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 116 (2000) ("The political, not legal controls of the election booth, history's regard, and impeachment on the one side, the demands of the Constitution and the system of precedent on the other, set a framework within which these allocations are made.").

<sup>22</sup> Dellinger cites, albeit selectively, a handful of cases to support his contention that judges agree that "there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional." Dellinger Memorandum, *supra* note 15, at 199. See *Myers v. United States*, 272 U.S. 52, 163-64, 176 (1926) (upholding the President's dismissal of an Executive officer in violation of a statute requiring the Senate's approval). More significantly, in *Freytag v. Commissioner of Internal Revenue*, Justice Scalia, writing for three other justices, commented that the President has "the power to veto encroaching laws, or even to disregard them when they are unconstitutional." 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

<sup>23</sup> See Dellinger Memorandum, *supra* note 15, at 208-09.



that *violates* the [C]onstitution.”<sup>24</sup> In other words, just as judges can pronounce the law unconstitutional (by exercising a power not explicitly mentioned in the Constitution), so too can the President (by invoking another power similarly unmentioned). If neither the Court nor the Framers has stated that *only* the Court can pronounce on the validity of an act of Congress,<sup>25</sup> then no bright-line constitutional impediment prevents Presidents from asserting such independent interpretive authority.

Indeed, the Constitution’s open texture has allowed a number of Chief Executives, including Thomas Jefferson,<sup>26</sup> Andrew Jackson,<sup>27</sup> then-former President James Madison,<sup>28</sup> and Abraham Lincoln<sup>29</sup> to assert their authority

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<sup>24</sup> Statement of James Wilson on December 1, 1787, in 2 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL COMMISSION AT PHILADELPHIA IN 1787*, at 443, 446 (2d ed. 1901). It is not clear what Wilson means by “shield himself,” but he might be referring to the President’s ability to protect himself politically. In that event, Wilson’s point would speak to the importance of the democratic legitimacy that the President can bring to assessments of statutes’ constitutionality.

<sup>25</sup> This authority is distinct from who might get the *final* say, a point on which Chief Justice Marshall was unequivocal. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”).

<sup>26</sup> Jefferson propounded a rather virulent version of such coordinate interpretation:

[N]othing in the Constitution has given [judges] a right to decide for the Executive, more than the Executive to decide for them. . . . The judges, believing the [Alien and Sedition] law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other.

Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 8 *THE WRITINGS OF THOMAS JEFFERSON*, 310-12 n.1 (Paul Leicester Ford ed., 1897).

<sup>27</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 183, 188-89 (2004) (describing Jackson’s veto of the Second Bank, which he deemed unconstitutional despite the Supreme Court’s holding to the contrary, and his reassertion of Jeffersonian departmentalism); JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 211 (2008) (explaining that Jackson thought that the question of whether “a President should not simply defer to the will and wishes of the Congress or the judiciary,” but rather should advance his own position and speak for the people—“[w]hose vision would prevail . . . was an open question . . . in American politics”).

<sup>28</sup> See KRAMER, *supra* note 27, at 188 (noting Madison’s eschewal of departmentalism for greater acceptance of judicial primacy and theorizing that the viewpoint stemmed from “watching Andrew Jackson’s catfight with Congress over the Second Bank”).

<sup>29</sup> See DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 190 (2005) (noting that Lincoln attacked the Supreme Court’s *Dred Scott* decision by

to interpret the Constitution independently. For many years, Presidents have asserted the right to decline to enforce statutes they deem unconstitutional and have relied on their attorneys—attorneys working, in some cases, in institutions created by Congress<sup>30</sup>—to provide legal support for their contentions.<sup>31</sup>

Finally, Congress itself has recognized the President's prerogative to decline to defend (although not to decline to enforce) a constitutionally objectionable statute. In 2002, Congress reaffirmed its tacit blessing of a degree of presidential coordinacy—the President's prerogative to interpret the Constitution for himself—in a provision of the 21st Century Department of Justice Appropriations Authorization Act,<sup>32</sup> which requires the Attorney General to advise Congress when the DOJ elects not to defend a statute.<sup>33</sup> The few courts mentioning this provision seem unperturbed by it,<sup>34</sup> and older cases note similar practices under earlier statutes.<sup>35</sup> Further, the statute's thirty-day deadline in anticipation of "enabl[ing] the House of Representatives and the Senate to take action . . . to intervene" in the case of the DOJ's nondefense<sup>36</sup> implies congressional acceptance of departmentalism and evidences that Congress sees *itself, too*, as a coordinate branch

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fastidiously focusing on its logical flaws); KRAMER, *supra* note 27, at 212 (discussing how "Lincoln . . . had criticized *Dred Scott* on departmental grounds when he campaigned for the Senate" and that, as President, he continued to ignore the Court's opinion by "recognizing black citizenship in a range of contexts"); Paulsen, *supra* note 19, at 276-84 (discussing Lincoln's suspension of the writ of habeas corpus and refusal to cooperate with Chief Justice Taney's decision (while riding circuit) in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861), holding that suspension unconstitutional).

<sup>30</sup> BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 87-88 (2010) ("[P]residents . . . can rely on two executive branch institutions—the Office of Legal Counsel in the Justice Department and the Office of Counsel to the President in the White House—to give their constitutional imprimatur to presidential power grabs.")

<sup>31</sup> *E.g.*, Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469 (1860) ("Every law is to be carried out so far forth as is consistent with the Constitution, and no further. The sound part of it must be executed, and the vicious portion of it suffered to drop.").

<sup>32</sup> Pub. L. No. 107-273, 116 Stat. 1758 (2002) (codified in scattered sections of 2, 5, 8, 12, 15, 18, 21, 28, 31, 38, 42, and 50 U.S.C.).

<sup>33</sup> *See supra* note 1.

<sup>34</sup> *See, e.g.*, *Log Cabin Republicans v. United States*, Nos. 10-56634 & 10-56813, 2011 WL 2683238, at \*1 (9th Cir. July 11, 2011) (accepting that "[t]he Government, of course, may refrain from defending the constitutionality of 'any provision of any Federal statute,'" but stating that, in response, "the court may allow amicus curiae to participate in oral argument in support of constitutionality" (citing 28 U.S.C. § 530D(a)(1)(B)(ii) (2006))).

<sup>35</sup> *See, e.g.*, *Gavett v. Alexander*, 477 F. Supp. 1035, 1043-44 (D.D.C. 1979) (noting a DOJ decision not to defend a statute and staying litigation for forty-five days, under a statute then in effect, to enable congressional intervention).

<sup>36</sup> 28 U.S.C. § 530D(b)(1)-(2).

competent to intervene in litigation to assert the constitutionality of its own legislation.

In sum, constitutional structure and scholarship, Supreme Court dicta, past presidential practice, and congressional acquiescence all point to the conclusion that Presidents often have discretionary authority—subject to political pressure—to choose whether to defend, and at times enforce, duly enacted statutes.<sup>37</sup> In a sense, our system of government has accepted this practice. For example, as Adam Liptak has pointed out, one Solicitor General's refusal to defend a Federal Communications Commission affirmative action program did not derail his career: "The [C]ommission filed its own brief defending the program, and the court upheld it. The acting Solicitor General who refused to defend the program, John G. Roberts, Jr., is now [C]hief [J]ustice of the United States."<sup>38</sup>

The question thus becomes what precisely a President should do, as a discretionary matter, about a statute he views as unconstitutional.<sup>39</sup> Should

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<sup>37</sup> There are, unsurprisingly, viable arguments for enforcing or defending a statute of questionable constitutionality. See, e.g., The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4a Op. O.L.C. 55, 55-56 (1980) (contending that the Attorney General "can best discharge the responsibilities of his office by defending and enforcing the Act of Congress" since the Judiciary is the branch responsible for striking down unconstitutional legislation); Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 79 (1995) ("Because of the respect to which the Congress is entitled as a coordinate branch of government, Solicitors General traditionally have recognized a general duty to defend congressional statutes against constitutional challenges.").

Further, the issue of whether Presidents have the authority to decline to enforce or defend statutes *before* a Supreme Court decision upholding a statute's constitutionality is different from the issue of whether Presidents have the authority to decline to enforce or defend statutes *after* a Supreme Court decision upholding the statute. While some have claimed or decried that "the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional," *Seven-Sky v. Holder*, 661 F.3d 1, 50 n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *abrogated by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), there seems to be little to the notion that the Executive can refuse to enforce—or defend—a statute once the Supreme Court has declared it constitutional. For the former proposition, Judge Kavanaugh in *Seven-Sky* cites to Justice Scalia's partial concurrence in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 906 (1991) (Scalia, J. concurring in part and concurring in the judgment). But while Justice Scalia does assert that the President has the power "even to disregard [laws] when they are unconstitutional," *id.*, he does not go as far as Judge Kavanaugh supposes: if the Supreme Court were to uphold a law, it would not be unconstitutional. As discussed below, the Dellinger framework is appropriately deferential to the Supreme Court's view; the concern here is with a statute that the President believes is unconstitutional *before* the Supreme Court has spoken on the matter.

<sup>38</sup> Adam Liptak, *The President's Courthouse*, N.Y. TIMES, Feb. 27, 2011, at WK5.

<sup>39</sup> Cf. Devins & Prakash, *supra* note 10, at 521 ("The duties to defend and to enforce are anathema to the text, structure, and early history of the Constitution. . . . Rather than resting on the Constitution, the duties to enforce and defend . . . are grounded on the bureaucratic interests of the Department of Justice."); Meltzer, *supra* note 10, at 1235 ("The question whether under these circumstances the Executive should continue to enforce and defend these statutes is not

the President's exercise be solely predictive, or should he also seek to influence the ultimate outcome of a Supreme Court decision? In other words, must he strictly apply the Court's legal framework, or does he have some prerogative to evaluate the statute's constitutionality on broader principles?<sup>40</sup>

### B. *Dellinger's Discretionary Framework*

When the President chooses whether to enforce a statute he views as unconstitutional, he needs a test to guide his decision. The 1994 Dellinger Memorandum lays out a framework as a series of "propositions" that the President should follow in making a nonenforcement decision.<sup>41</sup> We can divide these maxims by what they propose for the President's role as President, his role with regard to Congress, and his role with regard to the Judiciary.

First, with respect to the President's role as President, Dellinger first points to the Take Care Clause<sup>42</sup> and the Oath Clause<sup>43</sup> for the proposition that "the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law."<sup>44</sup> Part of this duty involves seeking to avoid unconstitutional interpretations when-

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governed by a legal rule derivable from the Constitution itself; it is instead a matter of judgment, informed by a welter of historical and institutional concerns.").

<sup>40</sup> Cf. David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 69-70 (2000). As Barron argues, "the Court's decision to uphold a statute against constitutional challenge does not constitute a final determination that would preclude other institutional actors, unburdened as they are by equivalent obligations of deference, from reaching a contrary conclusion." *Id.* at 69. Rather, tests like rational basis review are designed with the concern of "deference to the political branches," *id.* at 70, since "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id.* at 77 (quoting *FCC v. Beach Commc'ns Inc.*, 508 U.S. 307, 314 (1993)) (internal quotation marks omitted). Given that the Court's doctrine "reflect[s] the Court's own conception of the limitations of its decisional capacities," the President might contend that "the political branches [may] make decisions on their own [and] do the kind of implementation of constitutional meaning that the Court will not itself perform." *Id.* at 69-70.

<sup>41</sup> See Dellinger Memorandum, *supra* note 15, at 200.

<sup>42</sup> See U.S. CONST. art. II, § 3, cl. 4 ("[H]e shall take Care that the Laws be faithfully executed . . .").

<sup>43</sup> See *id.* art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'").

<sup>44</sup> Dellinger Memorandum, *supra* note 15, at 200.

ever possible and “exercis[ing] . . . independent judgment to determine whether the statute is constitutional.”<sup>45</sup>

Second, this Take Care duty also involves deferring to Congress whenever possible. Prophylaxis is preferable: the President should endeavor to correct unconstitutional provisions during the legislative process, before they become law.<sup>46</sup>

Third, the President must more extensively consider his role in a hypothetical dialogue with the Judiciary, which has the final say. If he believes that a statute’s unconstitutionality is unavoidable, he examines the implications of (and for) judicial review. Key to this assessment is whether the President believes that the Supreme Court would uphold the offending provision. If he believes the Court would side with his assessment of unconstitutionality, he should “weigh[] . . . the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch’s constitutional authority,” as well as determine whether his action or inaction “will permit judicial resolution of the issue.”<sup>47</sup> This inquiry also allows him to consider whether his course of action will facilitate review by the Supreme Court.<sup>48</sup>

Dawn Johnsen has suggested a number of refinements to Dellinger’s framework by focusing on particular criteria, two of which are relevant here: (1) the clarity of the provision’s “constitutional infirmity,” and (2) the effect of nonenforcement on the likelihood of judicial review.<sup>49</sup> These factors are consistent with Dellinger’s, but they add value because they shift the emphasis of the inquiry from deference to the Judiciary to the institutional competence of the Executive.

First, Johnsen contends, the President’s own views of the Constitution should weigh more heavily where “the presidency, as an institution, possesses special expertise,” as with political or military issues.<sup>50</sup> In other words, the President should not limit himself to a predictive analysis regarding how the Court would resolve the issue, but rather should assert his own expertise.

Second, she proposes, Presidents might actively *seek* judicial review. Johnsen views ultimate judicial resolution of statutes as both better respecting the separation of powers and promoting “better constitutional

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 201.

<sup>48</sup> *Id.*

<sup>49</sup> Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 44 (2000).

<sup>50</sup> *Id.* at 45; see also *id.* at 45-46, 52, 56.

outcomes.”<sup>51</sup> She cites Professor Eisgruber for the proposition that “insulated from electoral control, required to justify decisions by written opinion, and selected partly on the basis of technical proficiency, judges have the opportunity, the incentive, and the ability to interpret the Constitution carefully.”<sup>52</sup> In the equal protection context in particular, the likelihood that the Court will enforce the asserted constitutional right depends in part on whether it will apply rational basis or heightened scrutiny,<sup>53</sup> since the decision of which test to use is often outcome-determinative.<sup>54</sup>

## II. THE DISCRETIONARY FRAMEWORK IN THE NONDEFENSE CONTEXT

The decision not to defend a statute is distinct from the decision not to enforce it. But largely because Dellinger constructed his framework for a hypothetical *nonenforcement* decision, this Part examines some of the key differences between the *nonenforcement* and the *nondefense* postures. For instance, President Franklin D. Roosevelt believed that a bill depriving particular government appointees of their salary was unconstitutional as a bill of attainder, but he nonetheless enforced it by failing to reappoint the employees.<sup>55</sup> His enforcement allowed the appointees to bring their action, but the Court also took note of President Roosevelt’s choice not to defend the bill<sup>56</sup> in holding it unconstitutional.<sup>57</sup> Because *nonenforcement* and *nondefense* are distinct and do not necessarily operate in tandem, when the President confronts a decision of whether to defend a statute that he believes violates equal protection principles, he must understand these differences.

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<sup>51</sup> *Id.* at 40.

<sup>52</sup> Eisgruber, *supra* note 19, at 354-55.

<sup>53</sup> Johnsen, *supra* note 49, at 48.

<sup>54</sup> *Id.* (explaining that judicial review is a “far more effective” means of declaring a statute unconstitutional when the Court employs a heightened scrutiny analysis rather than rational basis review); see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978) (characterizing equal protection as “an underenforced constitutional norm,” as reflected in state tax and economic regulations being “broad[ly] exclu[ded]” from the reach of the Court’s interpretation of equal protection). For an example to which Professor Sager points, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). In this challenge to public school funding disparities, “Texas virtually concede[d] that its historically rooted dual system of financing education could not withstand . . . *strict judicial scrutiny*.” *Id.* at 16 (emphasis added). However, the Court applied the rational basis standard, since poverty is not a suspect classification, and found that Texas had ample legitimate interests to justify its school funding system—despite the resulting unequal expenditures in different districts. *Id.* at 54-55.

<sup>55</sup> See *United States v. Lovett*, 328 U.S. 303, 304-05 (1946).

<sup>56</sup> *Id.* at 305 n.1.

<sup>57</sup> *Id.* at 315.

In brief, I conclude that the takeaways from the distinction between non-enforcement and nondefense must form part of the President's inquiry. I begin first by pointing out that the Dellinger/Johnsen framework is easily adapted to the nondefense context. Then, I argue that some of the propositions from that framework actually apply with *greater* force in the nondefense context and thus deserve greater elaboration here: First, nondefense is less offensive to separation-of-powers principles, because it is more deferential to both Congress and the Court. Second, the framework may apply better to backward-looking (as opposed to forward-looking) decisions. Since non-defense supposes continued enforcement of the offending statute, nondefense decisions are more likely to arise after an administration change (where the previous administration had enforced and defended the statute, in addition, very possibly, to signing it into law). When inheriting a statute he believes to be unconstitutional, the President is more likely to refuse to defend than to refuse to enforce it.<sup>58</sup> It is only fitting, therefore, that the elaborated model include, where applicable, backward-looking criteria exhorting the President to consider, for instance, congressional motives<sup>59</sup> and changed circumstances, as opposed to solely how the statute will fare before the Court. Finally, nondefense presents better prospects for securing judicial review, a crucial component of the framework.

*A. Applicability of the Dellinger/Johnsen Framework  
to Nondefense Decisions*

The Dellinger/Johnsen framework can be applied with only minor changes to nondefense decisions. First, both nonenforcement and nondefense scenarios share the same predicate: the President believes that a statute is unconstitutional and must eventually be nullified. Nondefense is simply a different mechanism for addressing the same conclusion. In both contexts,

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<sup>58</sup> This point is—to my knowledge, at least—theoretical, rather than empirical, and deserves clarification. Theoretically, deciding not to enforce a statute is more controversial, and thus also more aggressive, than deciding not to defend it. As a result, I suspect, the President may have to expend more political capital to stop enforcing than to stop defending the same law; similarly, he is more likely in the case of nonenforcement to jeopardize any reliance interests in the law's enforcement. In turn, these factors make a President more likely to refuse to enforce where he can avoid compromising reliance interests and lessen his expenditure of political capital by announcing before the passage of a law that he will refuse to enforce it. Consider, for example, President Clinton's nonenforcement decision regarding the HIV provision. *See infra* note 60 and accompanying text. In this theoretical structure, nonenforcement decisions thus would more likely be forward-looking. By contrast nondefense decisions would be more likely to be backward-looking.

<sup>59</sup> *See* Barron, *supra* note 40, at 80 ("Unlike the Court, the President need not necessarily assess the wrongfulness of the legislative motive through such a deferential screen [as rational basis].").

the Take Care and Oath Clauses presuppose the President's same constitutional obligations to faithfully execute the laws of the United States.

Second, in both the nonenforcement and nondefense contexts, the President considers his relationship with Congress and the Judiciary. The President's Take Care and Oath obligations are the same in both contexts with regard to correcting unconstitutional bills during the legislative process: He has the same responsibility preventively to correct legislation that he would consider refusing to enforce or defend if it were enacted. Repeal, if viable, is equally compatible with nondefense.<sup>60</sup> And if the President determines that a statute is unavoidably unconstitutional, Dellinger and Johnsen's exhortations to consider judicial review make equal sense: nondefense presupposes ongoing (or at least imminent) litigation. The question thus becomes how any distinction between nondefense decisions and nonenforcement decisions—a distinction not fleshed out by the Dellinger/Johnsen framework—should matter to a President considering whether to defend a statute that appears to violate equal protection.

### B. Separation-of-Powers Principles

Nondefense decisions better respect separation-of-powers principles than do nonenforcement decisions, and this characteristic makes them comport better than even nonenforcement decisions with the Dellinger/Johnsen framework's contemplated role for the President in relation to Congress and the courts. Nondefense presents less of a concern that the President will butt heads with Congress, because nondefense (a) avoids executive lawmaking,<sup>61</sup> (b) is symbolically more deferential by

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<sup>60</sup> For example, President Clinton announced that, were a provision which would prohibit HIV-positive individuals from serving in the military not repealed, he would refuse to enforce it. See Chrysanthé Gussis, Note, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591, 597 (1997) (recounting Clinton's dilemma prior to the provision's repeal, as well as his instruction to the DOJ not to defend the law); see also Johnsen, *supra* note 49, at 54-58 (describing the circumstances and primary factors that influenced Clinton's nonenforcement decision).

<sup>61</sup> Cf. Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1219-20 (2012) (explaining that "there is a difference between enforcing a law and defending it," because defending a law "will not affect its operation at all," but rather only "provide[] the court with [the Executive's] understanding of what the Constitution requires" (citing *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 889 (3d Cir. 1986) ("This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best."))); Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382 (1986) (arguing that "when the President tries to do more than he is permitted" by not faithfully enforcing a statute, "he becomes a lawmaker, a status foreign to the constitutional division of power").



treating the statute as constitutional (as the President continues to enforce the statute), and (c) permits Congress to appropriate funds to defend the statute in court. Nondefense thus splits the difference: the President defers to Congress by giving the statute effect through enforcement and by giving Congress an opportunity to defend the law, but he also gives voice, particularly in court, to his own concerns about the act's constitutionality. As I discuss below, implementing this strategy allows a President concerned that a statute violates equal protection principles to increase the likelihood that a court, and ultimately the Supreme Court, will hear and resolve an issue of significant societal and legal importance.

In continuing to enforce (but not defend) the offending act, the President also defers to the Judiciary, because nondefense often solicits the Court's judgment, whereas nonenforcement might prevent facial challenges for lack of a case or controversy.<sup>62</sup> Inasmuch as the President makes nondefense a legal or moral matter, nondefense may encourage the Court to take the case,<sup>63</sup> and, having done so, to adopt the President's argument.<sup>64</sup> The high percentage of Supreme Court cases in which the government is involved suggests as much.<sup>65</sup>

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<sup>62</sup> Another drawback to nonenforcement is that minorities affected by the law might fear a decision by the same or a subsequent administration to enforce the statute, thereby forcing those minorities to challenge the statute in a more hostile political regime and without the Executive's support. On the other hand, if the supportive Executive enforces the statute, he allows those minorities to challenge it in court, and can make affirmative arguments against the statute's constitutionality in the ensuing litigation. See *infra* Section IV.C. Additionally, even while presidential nonenforcement might temporarily nullify a federal statute, parallel state statutes could extend the same discrimination unabated, without a Supreme Court holding that would also abrogate the state discrimination. Litigants would then have to challenge the practice on a state-by-state basis until and unless the United States Supreme Court resolved the case.

<sup>63</sup> "Jawboning, or moral suasion, . . . can . . . encourage the Court to take action." KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 98 (2007).

<sup>64</sup> See RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT* 8-9 (2012) (introducing a statistical study "point[ing] toward one unmistakable finding": "the [Office of the Solicitor General (OSG)] does not simply succeed before the U.S. Supreme Court, it actually influences the Court throughout its decision-making process"); *id.* at 72-91 (interrogating and discussing the OSG's influence on merits outcomes and concluding that "[w]hen compared to other attorneys with similar experience who enjoyed similar backgrounds and contextual advantages, the OSG still was much more likely to win its cases"); *id.* at 92-112 (discussing the influence of OSG briefs and noting that "the Court borrows more [language] from OSG briefs because it trusts the professional judgment of the lawyers within that office"); *id.* at 113-33 (discussing the influence of the OSG on legal doctrine); see also REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 94-100 (1992) (explaining why the Solicitor General has been called the "Tenth Justice" due to his influence before the Court).

<sup>65</sup> See *Office of the Solicitor General: About the Office*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/osg/about-osg.html> (last visited Oct. 11, 2012) ("The United States is involved in

Similarly, nondefense might prompt the Court to consider a variety of arguments, some of which could help it to reach the best decision. In some cases, the DOJ might withdraw arguments it feels it cannot reasonably support—and what the DOJ thinks is reasonable is likely influenced by what the President, who can remove the Attorney General and Assistant Attorneys General at will,<sup>66</sup> thinks is reasonable. Given this pressure, the Judiciary might receive a fuller range of arguments if Congress's own litigators are allowed to intervene (including, under rational basis review, arguments based on post hoc rationality), rather than if the Court hears only from an ambivalent DOJ. First, as Devins and Prakash argue, the law's proponents gain little when the President offers "a tepid defense" and "might admit [the law's] constitutional infirmities."<sup>67</sup> Second, nondefense might encourage the Court to consider a diversity of congressional viewpoints, because not all members of Congress will see the statute the same way.<sup>68</sup> Ultimately, the statute will be defended; even if members of Congress lack standing,<sup>69</sup> the Court can, and will, appoint amici to carry out the defense.<sup>70</sup>

So whereas the nonenforcement model exhorts the President to consider what the Court would rule, nondefense in combination with enforcement asks the Court actually to rule. By ultimately deferring to the Court, the President neither usurps Congress's authority, nor aggrandizes his own at the expense of the former.<sup>71</sup> In the equal protection context, striking this balance is

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approximately two-thirds of all the cases the U.S. Supreme Court decides on the merits each year.").

<sup>66</sup> Cf. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (explaining that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment," since the President has removal power over Executive officers); accord *Morrison v. Olson*, 487 U.S. 654, 685-86 (1988).

<sup>67</sup> Devins & Prakash, *supra* note 10, at 572; see also Gorod, *supra* note 61, at 1239-41 (arguing that in "cases in which the Executive Branch does not actually believe the law is constitutional," its "defense" of a statute may actually undermine the interests of an adversarial system of justice more than it promotes them"); Johnsen, *supra* note 49, at 49-50 (arguing that the President can better serve the Court and promote inter-branch constitutional discourse by advancing "his actual constitutional views" while Congress offers its own).

<sup>68</sup> See Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244, 249 (1992).

<sup>69</sup> E.g., *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (holding that individual members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act).

<sup>70</sup> See Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 466 (2009) ("[T]he Supreme Court occasionally appoints amicus curiae to argue a position that no party to the case supports . . ."). See generally Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907 (2011).

<sup>71</sup> The Court's separation-of-powers jurisprudence focuses on "encroachment and aggrandizement." *Mistretta v. United States*, 488 U.S. 361, 382 (1989). "[S]tatutory provisions that to

particularly important: while the Court often has a countermajoritarian role to play,<sup>72</sup> true change requires the cooperation of the political branches, which can also help convince the Court to weigh in in the first place.

*C. Forward- vs. Backward-Looking: The Need  
to Consider Changed Circumstances*

Much of Dellinger's construct is forward-looking. Dellinger first points to bills "under consideration by Congress,"<sup>73</sup> thereby suggesting that the President's nonenforcement decision looks forward toward the enactment of pending bills. He similarly adopts a forward-looking perspective when he explains that the President should consider whether a provision "*would* violate the Constitution"<sup>74</sup> (as opposed to whether it *violates* the Constitution).<sup>75</sup>

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some degree *commingle the functions of the Branches*, but that pose no danger of either aggrandizement or encroachment," may be permissible. *Id.* (emphasis added). If anything, the nondefense decision puts more power in the hands of the courts, which already have the power "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Some have suggested that, from the perspective of constitutional law or political legitimacy, continuing to enforce an indefensible act is problematic. *E.g.*, Devins & Prakash, *supra* note 10, at 535 ("[T]he Constitution never bifurcates the duty to take care that the laws be faithfully executed, generally requiring the Executive to enforce laws but authorizing him to decline to defend them in some cases."); Aziz Huq, *Enforcing (But Not Defending) "Unconstitutional" Laws*, 98 VA. L. REV. 1001, 1025-27 (2012) (arguing that the Obama administration should not have uncoupled its decision to enforce the Defense of Marriage Act while not defending it); Aziz Huq, *Half-Empty: The Obama Administration's New DOMA Position May Help a Handful of Gay Couples at the Expense of All the Rest*, SLATE (Feb. 28, 2011, 6:35 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/02/halfempty.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/02/halfempty.html) ("Holder's distinction between taking a position in court and doing something in practice has an arbitrary feel."). Yet there is still value in the incremental approach of enforcing but not defending—an approach that allows the President to respect the separation of powers while still presenting his own constitutional views.

<sup>72</sup> See, e.g., *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (suggesting that, in future cases, courts may need to consider the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

<sup>73</sup> See Dellinger Memorandum, *supra* note 15, at 200.

<sup>74</sup> *Id.* (emphasis added).

<sup>75</sup> This forward-looking perspective is unsurprising given that the Dellinger Memorandum initially grew out of conversations regarding hypothetical nonenforcement decisions among Abner Mikva, then-White House Counsel; John (Jack) Quinn; then-Chief of Staff to the Vice President; and Walter Dellinger, who at the time was Assistant Attorney General in charge of the DOJ's Office of Legal Counsel. Dellinger's draft memo, and later OLC opinion, became all the more timely when the provision barring HIV-positive individuals from military service came across President Clinton's desk. Conversation with Walter Dellinger, Partner, O'Melveny &

But the Dellinger/Johnsen framework applies better still to nondefense decisions because of their often-backward-looking nature. A President assessing whether a statute violates equal protection will likely have inherited that statute, and that question, from a prior administration. Any nondefense decision regarding the statute will necessarily be backward-looking, especially because the President will likely continue to enforce the offending statute,<sup>76</sup> which the previous administration had probably already enforced.<sup>77</sup>

Backward-looking nondefense decisions demand attention to intervening changes in both society and the law since the provision's enactment, and therefore suggest that the President should expressly consider a "changed circumstances" factor. This criterion would allow the President to assess whether society, his understanding thereof, or the law have changed in ways material to his projections for—and prospective influence on—a future Court decision. Specifically, it would help him reflect on whether similar developments clarify what could not have been seen before: that the law is unconstitutional.<sup>78</sup> Changed-circumstances analysis asserts, among other things, that Congress's institutional competence as a prospective factfinder and lawmaker has reached a breaking point. Congress, perhaps gridlocked, cannot as easily account for and review the mismatch of its predictive efforts and reality; the Court and the President, as post-enactment actors, are better equipped to administer the requisite retrospection. In essence, a nondefense stance will ultimately ask the Court to consider changed circumstances.

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Myers LLP (July 13, 2012); *see also* Johnsen, *supra* note 49, at 54–58 (discussing President Clinton's stance on the provision). Dellinger eventually advised President Clinton not to defend the statute, but Clinton nevertheless signed the offending statute into law (as part of the 1996 Defense Authorization bill). Jack Quinn, Counsel to the President, & Walter Dellinger, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, Press Briefing, (Feb. 9, 1996), *available at* <http://clinton6.nara.gov/1996/02/1996-02-09-quinn-and-dellinger-briefing-on-hiv-provision.html>.

<sup>76</sup> *E.g.*, *United States v. Lovett*, 328 U.S. 303, 305 n.1 (1946) (explaining that, although President Roosevelt believed the bill depriving the plaintiffs of their salary was unconstitutional, he nevertheless enforced it by not reappointing the plaintiffs).

<sup>77</sup> *See also supra* note 58 and accompanying text.

<sup>78</sup> *E.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973) (plurality opinion) (noting the momentous social and legal changes with regard to gender and quoting Justice Bradley's infamous concurrence in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring), in which he wrote that "[t]he paramount destiny and mission of woman [sic] are to fulfil [sic] the noble and benign offices of wife and mother"); *see also infra* notes 150–155 and accompanying text (discussing *Frontiero* and the failed attempt to ratify the Equal Rights Amendment).

D. *The Heightened Need for Judicial Review,  
and How Nondefense Facilitates It*

If the President truly believes that a statute violates equal protection, he will want the Court to endorse his position. Nondefense facilitates striking the repellent statute from the books, as it presents better prospects for judicial review than does nonenforcement. By enforcing but not defending a statute, the President suggests that the statute's constitutional infirmity is not clear, or, alternatively, that he either lacks political support for non-enforcement or wants to assume a deferential separation-of-powers stance. As discussed in Section II.B, nondefense is less threatening than non-enforcement, both because it is less assertive<sup>79</sup> and because it still allows Congress to defend the constitutionality of the offending act in litigation.<sup>80</sup> When the President has serious doubts regarding a statute's constitutionality, Congress may even be a more spirited advocate.<sup>81</sup> Further, nondefense is also less threatening to separation-of-powers principles because it allows the Court to *affirm* the statute's constitutionality.<sup>82</sup>

Moreover, nondefense could embolden plaintiffs to bring test cases,<sup>83</sup> which would provide reviewing courts with a more expansive factual record.<sup>84</sup> Further, DOJ advisory opinions<sup>85</sup> and briefs can provide courts

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<sup>79</sup> Nondefense is often a lesser-included element of most nonenforcement decisions. See Gussis, *supra* note 60, at 605 n.67 ("There are no instances where Presidents have not enforced, yet have defended, legislation.").

<sup>80</sup> See 28 U.S.C. § 530D(b)(2) (2006) (contemplating congressional intervention by requiring the DOJ to notify the House and Senate "within such time as will reasonably enable" them "to intervene in timely fashion in the proceeding"); Johnsen, *supra* note 49, at 50 (explaining that, in cases of nondefense, "Congress remains free, through other attorneys, to present its defense of the statute in the litigation").

<sup>81</sup> See *supra* notes 67 & 68 and accompanying text.

<sup>82</sup> At least, DOMA's intervening defenders appear to think so: "There are currently seven other DOMA cases pending in district courts around the country in six different circuits. . . . This proliferation of cases is a product of the Department's incoherent decision to implement-but-not-defend DOMA." Petition for a Writ of Certiorari at 21, *Bipartisan Legal Advisory Grp. v. Gill*, No. 12-13 (U.S. June 29, 2012).

<sup>83</sup> For instance, the Court affirmed the constitutionality of an FCC policy of "awarding preferences to minority owners in comparative licensing proceedings," *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 558 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), over the DOJ's argument that the law was unconstitutional, see Brief for United States as Amicus Curiae Supporting Petitioner at 26-27, *Metro Broadcasting*, 497 U.S. 547 (No. 89-453).

<sup>84</sup> Cf. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 953-91 (N.D. Cal. 2010) (presenting extensive findings of fact to assess whether California's Proposition 8, which bans same-sex marriage, violated the Equal Protection Clause), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

<sup>85</sup> See Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 745 (2005) (observing that the Executive Branch, unlike the judiciary, can issue helpful advisory opinions "in advance of any concrete controversy").

with guidance based on the strength of their reasoning and their “power to persuade.”<sup>86</sup> An advisory opinion may be particularly able to persuade the Court because the DOJ can draw on and synthesize the myriad administrative perspectives regarding the unconstitutionality of the act as applied.<sup>87</sup>

In sum, continuing to enforce the law without defending it helps trigger judicial review<sup>88</sup> and, just as importantly, gives Congress the opportunity to reconsider the law (and thus its possible repeal) by forcing it to justify the provision in the ensuing litigation.<sup>89</sup> Overall, executive nondefense decisions can have the salutary effect of fostering productive constitutional dialogue among all three branches of government.<sup>90</sup> The Court then has more angles from which to view the issue. As in *Metro Broadcasting, Inc. v. FCC*, the Court might disagree with the DOJ that the statute is unconstitutional, and uphold it.<sup>91</sup> On the other hand, this spirited dialogue may eventually persuade the Court to rule otherwise—as when it overruled *Metro Broadcasting* only five years later.<sup>92</sup>

### III. AN ARGUMENT FOR HEIGHTENED AUTHORITY IN THE EQUAL PROTECTION CONTEXT

I am concerned in particular in this Comment with the President who faces the difficult decision of whether to defend a statute he believes violates equal protection. The President’s authority not to defend constitutionally objectionable statutes is not uniform across all areas of constitutional law.<sup>93</sup> While I have argued above that the Dellinger/Johnsen framework can

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<sup>86</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (describing how courts should analyze the rulings and interpretations of administrative agencies in certain circumstances).

<sup>87</sup> Cf. Theodore C. Hirt, *Current Issues Involving the Defense of Congressional and Administrative Agency Programs*, 52 ADMIN. L. REV. 1377, 1378-84 (2000) (explaining the centralization of litigation authority in the Federal Programs Branch of the Civil Division of the DOJ and describing how the Branch develops expertise in considering a wide variety of agency programs).

<sup>88</sup> See Rao, *supra* note 21, at 548 (“Execution of the laws usually generates public awareness of the President’s actions and triggers the possibility of political and judicial review.”).

<sup>89</sup> See, e.g., *supra* note 60 (discussing President Clinton’s exertion of pressure on Congress to repeal the military HIV ban).

<sup>90</sup> See, e.g., Josh Gerstein, *Obama Administration Asks Court to Lift Ban on ‘Don’t Ask, Don’t Tell,’ Again*, POLITICO (July 14, 2011), [http://www.politico.com/blogs/joshgerstein/0711/Obama\\_administration\\_asks\\_court\\_to\\_lift\\_ban\\_on\\_dont\\_ask\\_dont\\_tell.html](http://www.politico.com/blogs/joshgerstein/0711/Obama_administration_asks_court_to_lift_ban_on_dont_ask_dont_tell.html) (describing the back-and-forth between the Ninth Circuit and the administration).

<sup>91</sup> See *supra* note 82.

<sup>92</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226-27 (1995), *overruling Metro Broad., Inc. v. FCC*, 497 U.S. 547, 558 (1990).

<sup>93</sup> Historically, the Court has tended to defer to the President on certain matters, including national security, POSNER & VERMEULE, *supra* note 21, at 30; see also *Korematsu v. United States*, 323 U.S. 214, 216, 223 (1944) (holding, despite employing strict scrutiny, that Congress and the

be adapted to the nondefense context, in this Part I turn to my argument that the equal protection context is one of the more compelling areas for presidential assertion of the prerogative not to defend a statute. I assert that the President's authority to make the nondefense decision is heightened in the equal protection arena.

This authority—or responsibility—is especially compelling where the President determines that Congress's classification should receive more than just rational basis scrutiny.<sup>94</sup> First, I begin by incorporating equal protection scholarship to argue that the President has the duty to ensure the protection of underenforced rights. I then assert that he thus also has the responsibility to alert the Court, through nondefense, where circumstances warrant heightened scrutiny. Finally, after establishing this responsibility, I offer a new model for nondefense where the President believes that a statute should be evaluated under heightened scrutiny pursuant to the Constitution's guarantee of equal protection.

The President has his own institutional competencies, so I do not contend that the standard he applies should be the same as that which a court reviewing the statute would apply. Instead, based on the factors discussed in this Part, I contend that the relatively open texture of Dellinger's nondefense

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Court had to defer to the judgment of "the properly constituted military authorities"), immigration and naturalization, *see Plyler v. Doe*, 457 U.S. 202, 225 (1982) (noting that with regard to immigration and naturalization, "[t]he obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field"), formal sovereignty and territorial governance, *see Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (noting that certain matters, such as "formal sovereignty and territorial governance . . . are best left to the political branches"), and "political questions," *see, e.g., Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) ("[T]he basic question presented . . . in this case is 'political' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.").

This deference seems to be at its height when separation-of-powers concerns are themselves at stake—an acknowledgement the President must be given some room to protect his prerogatives. *See Dellinger Memorandum*, *supra* note 15, at 201; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (Jackson, J., concurring) (recognizing the existence of the President's authority to, at times, act contrary to a statutory command). The Justices implicitly agree that the President must be allowed to defend his vision of his own powers in court. *Cf. Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*) ("The Framers regarded the checks and balances . . . built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."). Further, in *INS v. Chadha*, the Solicitor General, far from defending the statute in question, attacked its constitutionality as "encroach[ing] upon the powers of the Executive in administering the Immigration and Nationality Act." Brief for Appellant-Respondent, *INS v. Chadha*, 462 U.S. 919 (1983) (Nos. 80-1832, 80-2170, 80-2171), 1982 WL 607268, at \*6.

<sup>94</sup> *Cf. Eisgruber*, *supra* note 19, at 356 ("Interpretive deference is more common in cases where structural, rather than rights-based, issues predominate.").

decisionmaking model should be elaborated with greater precision for equal protection nondefense decisions. The refinements I offer help both to contextualize the exceptional nature of the nondefense decision (and thus serve as a limiting principle for future Presidents who might seek to aggrandize their office through selective enforcement or defense of statutes) and to emphasize the importance of the distinction between nonenforcement and nondefense in the equal protection context.

*A. The Case for Greater Authority Where Equal Protection  
Demands Heightened Scrutiny*

Where the President believes a statute is unconstitutional on equal protection grounds, and specifically where he believes the standard of review should not be rational basis, but rather a heightened form of scrutiny, he has increased nondefense authority and should engage in his own version of searching review before making the final decision of whether to defend the law. In this Section, I argue why we should have a new framework for presidential nondefense authority in such situations. I do not address other areas where one might argue that important rights are at stake—for example, the First Amendment and fundamental rights (including those protected by substantive due process). Rather, I contend that denial of equal protection is, as the Court first alluded to in its famous footnote in *United States v. Carolene Products Co.*, a special case,<sup>95</sup> fraught more than any other with the danger of majoritarian tyranny.<sup>96</sup>

If the Court is underenforcing a constitutional mandate such as equal protection (ostensibly for separation-of-powers and institutional competency reasons<sup>97</sup>), and Congress has already taken a position the President deems unconstitutional, then the President must take a less deferential stance than the posture he usually assumes. The Court's three-tiered review system should further inform his inquiry, but not constrain it.<sup>98</sup> The President has an enhanced responsibility to (1) ensure protection of the underenforced right, and (2) alert the Court through nondefense that he believes that conditions warrant a stricter standard of review. The first proposition is an

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<sup>95</sup> See 304 U.S. 144, 152-53 n.4 (1938).

<sup>96</sup> See generally LANI GUINIER, *TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1995).

<sup>97</sup> See Pillard, *supra* note 85, at 692 (arguing that when courts use rational basis review, they "leave it to the political branches to fill the enforcement gap").

<sup>98</sup> See Barron, *supra* note 40, at 77-78 ("[T]he President's substantive constitutional judgment in this instance most likely was not the result of a prediction about how the Court would rule if the case were put before it. . . . [T]he Court would have been likely to have upheld Section 567 in the face of a private challenge to it.").



extension, based on the Take Care Clause, of the *Carolene Products* principle: in a representative democracy, minorities risk unfair—and oftentimes unconstitutional—deprivation of rights enjoyed by the majority. And the second relies, to an extent, on the President's special institutional competence in his ability to litigate and influence the Court, as well as to assuage the Court's structural concerns regarding deference to the other branches.

In an equal protection underenforcement situation, the President is not using his powers for self-aggrandizement: rather than seeking to usurp interpretive authority from the Court, the President is asking the Court to check the political branches more vigorously. Nor is he seeking to usurp Congress's authority: the very question is not simply whether the Court would agree with the Executive, but whether Congress itself deserves deference, and if not, whether the Executive can (and should) help induce the Court to apply heightened scrutiny. This series of questions further helps to constrain nondefense decisions to higher-stakes contexts and thereby maintain the balance of power among the branches of government.

1. The President's Enhanced Responsibility to Ensure the Protection of Underenforced Rights

The President has an enhanced responsibility to ensure protection of underenforced constitutional rights and mandates.<sup>99</sup> I begin with Larry Sager's contention that the history of civil rights in the United States empirically demonstrates that the Court—and, perhaps, the entirety of the federal government—sometimes underenforces important rights later recognized under the Constitution.<sup>100</sup> I then assert that when the Court fails to enforce constitutional rights, the logical conclusion is that the onus falls on the President to do so.

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<sup>99</sup> See Sortirios A. Barber & James E. Fleming, *The Canon and the Constitution Outside the Courts*, 17 CONST. COMMENT. 267, 267 (2000) (asserting that the Constitution "imposes higher obligations upon legislatures, executives, and citizens generally to pursue constitutional ends or to secure constitutional rights").

<sup>100</sup> See generally Sager, *supra* note 54; Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993); see also generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 504-05, 586-87 (2002) (recounting Senator Charles Sumner's "repudiat[ion of] the legitimacy of separate but equal facilities" as early as 1870, but the failure of his corresponding bill to pass, and noting the flagging "support for the idea of federal intervention to enforce the Fourteenth and Fifteenth Amendments" in the South beginning around 1877).

a. *The Court's Underenforcement of the Constitution*

While the Court has not recognized a *Carolene Products* role for the President, it has recognized that the political branches are tasked with ensuring the vitality of a number of (potentially) otherwise underenforced constitutional rights. What is less clear is whether the Constitution substantively extends these rights—arguably it does not—or whether the Court simply recognizes that, because of the separation of powers, it is not the appropriate institution to flesh out those guarantees.<sup>101</sup> Either way, though, this recognition lends support to the notion that the President likewise has a responsibility to ensure constitutional execution of the laws.

Because the Court's recognition of the role of Congress and the Executive comes in the form of deference—and thus the risk of its own underenforcement where the political branches fail to act—this tension between democratic lawmaking and majoritarian tyranny inheres in our democracy.<sup>102</sup> Yet, as the following discussion of procedural due process and equal protection cases will show, the Court has continually reexamined where it draws the line between aspirational constitutional rights, the extension of which it entrusts to the political branches, and judicially enforceable constitutional rights, which individual plaintiffs can seek to vindicate. This constant boundary-line redrawing renders the territories on either side “up for grabs,” and suggests that the President might declare some zones more properly within the judicial domain as the meaning of equal protection shifts.

The Court has explicitly recognized, in the deference it has shown to Congress and state legislatures in procedural due process cases in the administrative law context, and in equal protection cases concerning welfare and poverty, that when its standard of review is rational basis, the responsibility for protecting certain classes of individuals falls on the elected

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<sup>101</sup> For example, Neal Katyal explains that one position “with regard to judicial supremacy” is that “[t]he Court has the responsibility to interpret the Constitution, but the question of what remedies are appropriate to rectify a constitutional violation is left to the legislature. The Court retains jurisdiction to review the remedy if it does not satisfy constitutional concerns.” Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1359-60 (2001). This position can be explained by Larry Sager's underenforcement work. *Id.* at 1370 (citing Sager, *supra* note 54, at 1213-15). Courts often evince this approach when they “fear imposing remedies due to their lack of expertise and their lack of political accountability, which can lead them to water down the substantive right to sidestep the remedy question altogether.” *Id.* at 1370.

<sup>102</sup> See, e.g., *Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649, 659 (E.D. La. 1961) (“One of the purposes of the Constitution of the United States was to protect minorities from the occasional tyranny of the majorities.”), *aff'd*, 368 U.S. 515 (1962); Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 388-89 (2007) (explaining that courts “limit[] majoritarian decisionmaking . . . whenever they vindicate any constitutional right”).

branches.<sup>103</sup> The responsibility of the elected branches to act is the corollary of the Court's underenforcement; it is the result of the Court's explicit deference to Congress and state legislatures under rational basis scrutiny.

In 1970, in *Goldberg v. Kelly*, the Court determined that New York welfare recipients had procedural due process rights to a hearing before losing their benefits.<sup>104</sup> That same year, though, in *Dandridge v. Williams*, the Court held that a Maryland regulation setting a maximum cap on welfare eligibility did not violate the Equal Protection Clause under the rational basis standard, because the state had a legitimate interest in "provid[ing] an incentive to seek gainful employment" by setting "a limit on the recipient's grant."<sup>105</sup> The Court analyzed the regulation under the rational basis standard, despite its observation that "[t]he administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings."<sup>106</sup> The decision of state officials deserved great deference—it was not to be "second-guess[ed]."<sup>107</sup>

Yet by 1976, the Court had cut back on *Goldberg*'s protections by holding, in *Mathews v. Eldridge*, that a disability-entitlement plaintiff had no procedural due process rights to a predeprivation hearing.<sup>108</sup> The Court explained that, "[i]n assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals."<sup>109</sup> That same year, in *Washington v. Davis*, the Court held that the Equal Protection Clause could not support claims of

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<sup>103</sup> Cf. *McClesky v. Kemp*, 481 U.S. 279, 319 (1987) (noting that the death penalty—and the limits thereon—falls largely to the legislatures, which are "constituted to respond to the will and consequently the moral values of the people" (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting) (internal quotation marks omitted))). Here, the Court concedes that there are fundamental rights at stake, but essentially argues that the political branches are better positioned to flesh them out. See Pillard, *supra* note 85, at 694 (arguing that the political branches seem to have been given the responsibility to ensure quality of legal counsel or fair application of the death penalty).

<sup>104</sup> 397 U.S. 254, 270-71 (1970). In dissent, Justice Black's dissent condemned the Court's decision as "wander[ing] out of [its] field of vested powers and transgress[ing] into the area constitutionally assigned to the Congress and the people." *Id.* at 274 (Black, J., dissenting).

<sup>105</sup> 397 U.S. 471, 486 (1970).

<sup>106</sup> *Id.* at 485; see also *id.* ("We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.").

<sup>107</sup> *Id.* at 487.

<sup>108</sup> See 424 U.S. 319, 335 (1976) (holding that procedural due process rights are to be assessed through a balancing test that includes taking into account the government's interest in avoiding fiscal burdens).

<sup>109</sup> *Id.* at 349 (emphasis added).

disproportionate impact based on race.<sup>110</sup> And in 1985, in *Cleveland Board of Education v. Loudermill*, the Court retrenched yet again by further reducing the amount of process required before a government employer may discharge an employee with a property right in continued employment.<sup>111</sup> While similar analogues exist, for example, in the Court's (and lower courts') shifting willingness to imply a *Bivens* cause of action<sup>112</sup> and in the First Amendment context,<sup>113</sup> the bottom line is that the elected branches often get just what they want—great latitude due to the Court's deference.<sup>114</sup>

b. *The Onus Falls on the President: A Carolene Products Perspective*

Given a Congress determined to legislate unconstitutionally, the President's responsibility is not dissimilar to the responsibility that the Court recognized for itself in *Carolene Products*. In *Carolene Products*, the Court reasoned that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>115</sup> While the *Carolene Products* footnote imagines the Court as the branch best-positioned to safeguard the rights of minorities, the footnote's primary premise is also applicable to a President who recognizes the unconstitutionality

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<sup>110</sup> See 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.") (internal citations omitted).

<sup>111</sup> See 470 U.S. 532, 547-48 (1985) ("[A]ll the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute.").

<sup>112</sup> For the case that implied a cause of action directly under the Constitution (specifically, the Fourth Amendment), see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). For a discussion of the shifting *Bivens* standards, see, for example, Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. (forthcoming Jan. 2013).

<sup>113</sup> See Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 75 (2000) (observing that the Court focused its energies on economic liberties rather than speech liberties before developing the modern understanding of the First Amendment). Schiller argues that the Court underenforced the First Amendment during the first decades of the twentieth century, and only began to offer greater protection for free speech as lower courts began "to lose faith in the ability of legislators [and administrators] to regulate speech." *Id.* at 3.

<sup>114</sup> See also, e.g., POSNER & VERMEULE, *supra* note 21, at 35, 208 (discussing the limp protections extended in *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004), in which the Court found that a basic military tribunal could satisfy due process concerns).

<sup>115</sup> *United States v. Carolene Prods. Co.*, 304 U.S. at 152 n.4 (1938).

of a statute, even if what motivates him to assess that unconstitutionality is his policy or his constituency.<sup>116</sup> That idea is that constitutional values—and, in particular, equal protection—are constraints with which we bind our own future democratic decisionmaking because we are concerned about our incapacity to restrain our prejudices and look out for those least well-represented—i.e., the tyranny of the majority.<sup>117</sup> We are concerned about a

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<sup>116</sup> Cf. Gorod, *supra* note 61, at 1231-35 (arguing that “the Executive Branch is, of course, full of such appointees intended to ensure that the Executive Branch’s policymaking is reflective of the political and philosophical views of the President who heads it”); *id.* at 1236-37 (observing that “it is not surprising” that the Executive should have its own legal views, and that it can “present those views to the courts.”).

<sup>117</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982) (“Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law.”); see also *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (laying out the four factors for determining whether a particular group should receive heightened scrutiny (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986))). Justice Thurgood Marshall explored the relationship between equal protection and the constitutional concern with majoritarian tyranny in *City of Cleburne v. Cleburne Living Center*, in which he observed that “[p]rejudice, once let loose, is not easily cabined . . . In light of the importance of the interest at stake and the history of discrimination the retarded have suffered, the Equal Protection Clause requires us” to apply heightened scrutiny. 473 U.S. 432, 464 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part). Justice Marshall’s Constitution is highly aware of, and responsive to, society’s inability to cope fairly with the rights that the majority may seek to strip from minorities; he is concerned with how prejudices are perpetrated through the polity:

The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group’s interests and needs. . . .

The discreteness and insularity warranting a “more searching judicial inquiry,” *United States v. Carolene Products Co.*, 304 U. S. 144, 153, n.4 (1938), must therefore be viewed from a social and cultural perspective as well as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereo[]type on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, “a page of history is worth a volume of logic.” *New York Trust Co. v. Eisner*, 256 U. S. 345, 349 (1921) (Holmes, J.).

*Cleburne*, 473 U.S. at 472-73 n.24 (Marshall, J., concurring in the judgment in part and dissenting in part). Compare *id.*, with 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1602, at 417-18 (Melville M. Bigelow ed., Boston, Little, Brown, & Co. 5th ed. 1891) (“[From] that fundamental principle of republican government . . . it is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing

particularly severe case of underenforcement, and disturbed, perhaps, that there is something more sinister about a discriminatory denial of rights than a universal denial of rights. This intuitive sense of “Kant’s categorical imperative” in this context “describes an ideal to which every constitutional authority should aspire.”<sup>118</sup>

The *Carolene Products* postulate holds no less true where that tyranny has shaped the status quo. For decades, equal protection has involved notions of legal change and the recognition that, in the past, the Court has not always enforced constitutional rights to equality to the appropriate degree.<sup>119</sup> Indeed, one of the core notions of the Court’s equal protection jurisprudence is that changed circumstances will uncover historically enduring, judicially permitted inequities.<sup>120</sup> The Court’s decision in *Brown v. Board of Education* recognized as much.<sup>121</sup> As Justice Breyer has written, “by 1954 it had become clear that racial segregation . . . had denied minority groups the very equality that the [Equal Protection C]ause sought to assure them.”<sup>122</sup> Deciding *Brown* depended on “applying not particular historical beliefs but the *values* that underlie” the Equal Protection Clause.<sup>123</sup> Just before stating its conclusion—“that in the field of public education the doctrine of ‘separate but equal’ has no place [because s]eparate educational facilities are inherently unequal”<sup>124</sup>—the *Brown* Court looked to “the extent of psycho-

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Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body.”).

<sup>118</sup> Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 330 (2002) (reviewing LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000)).

<sup>119</sup> See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (tracing the changing notions of, and case law regarding, race and civil rights throughout the Cold War).

<sup>120</sup> See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) (“[T]he Equal Protection Clause is not shackled to the political theory of a particular era. . . . [W]e have never been confined to historic notions of equality . . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.”).

<sup>121</sup> See 347 U.S. 483, 494-95 (1954) (“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.” (footnote omitted)).

<sup>122</sup> STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 78 (2010).

<sup>123</sup> *Id.*; see also *id.* at 150 (“[T]he Court, the legal community, and much of American society had begun to see the *Plessy* decision as legally wrong and the segregated society it helped build as morally wrong[—a wrong that] had worked incalculable harm.”).

<sup>124</sup> *Brown*, 347 U.S. at 495.

logical knowledge”<sup>125</sup> and how it had developed from the state of social science at the time of *Plessy v. Ferguson*,<sup>126</sup> decided half a century earlier.<sup>127</sup>

Less well known, though, is the historical role that the President has played in the evolution of equal protection doctrine.<sup>128</sup> If we accept Larry Sager’s argument that there is space between constitutional case law and the Constitution itself,<sup>129</sup> then if the Court is underenforcing a right, another branch must attend to that space. And in the past, Presidents have done so.

That the President, as a normative matter, should take an active hand in navigating these waters flows logically from the confluence of three primary factors. First, the underlying values—equal protection of minorities at the mercy of majoritarian tyranny, as recognized in *Carolene Products*—demand scrutiny of the majority’s motivations. But underlying *Carolene Products* and equal protection jurisprudence lies a compromise between determining what the Constitution might actually mean and deferring to Congress out of separation-of-powers concerns. The Court’s three-tiered equal protection framework, built upon this compromise, therefore wavers due to internal instability. Rules for intermediate scrutiny, for instance, “are at once deferential and overprotective.”<sup>130</sup> That is, these rules can be both under- and overinclusive, as when they do not sufficiently scrutinize “‘actual’ legislative motivation,” at the one end, and when, at the other, they hold legislative motives “impermissible on the basis of doctrinal tests that are intended to evaluate motive without engaging in the kind of searching inquiry that might reveal the motive[s] to have been pure.”<sup>131</sup>

This compromise is evident in both the heightened and strict scrutiny constructions: the point is not that the government can never distinguish or “classif[y] on the basis of certain characteristics, including race, national origin, illegitimacy, and gender,”<sup>132</sup> but that “[t]hese factors are

<sup>125</sup> *Id.* at 494.

<sup>126</sup> 163 U.S. 537 (1896), overruled by *Brown*, 347 U.S. 483.

<sup>127</sup> *Brown*, 347 U.S. at 494-95.

<sup>128</sup> See, e.g., DUDZIAK, *supra* note 119, at 25-26 (discussing President Harry Truman’s consideration of African American voters in developing his pro-civil rights stance).

<sup>129</sup> See Sager, *supra* note 100, at 414 (pointing out that some “claims of justice” under the Constitution will not be upheld by the courts, but rather must be “affirmed by the institutions of popular government: Congress, the President, or their legislative or Executive counterparts in state and local governments” and describing this phenomenon as “a gap between the reach of constitutional case law and the reach of justice”).

<sup>130</sup> Barron, *supra* note 40, at 71.

<sup>131</sup> *Id.*

<sup>132</sup> Petition for a Writ of Certiorari at 12-15, U.S. Dep’t of Health & Human Servs. v. Massachusetts, No. 12-15 (July 3, 2012) available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-15-Mass-Gill-Petition-final.pdf> [hereinafter Solicitor General’s *Massachusetts* Certiorari Petition].

so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.”<sup>133</sup> In some ways, this tension is a natural consequence of the fact that the Equal Protection Clause means that “all persons similarly situated should be treated alike”<sup>134</sup> and the “practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”<sup>135</sup> But the point is that while the Court’s test will not always be able to smoke out impermissible motivations, asking whether Congress had impermissible motivations is the right approach.

Second, Congress, in the nondefense context, has by definition removed itself as a source of constitutional protection. That the President has not similarly removed himself does nothing to lessen the *Carolene Products* rationale that the “political processes” are unsuited to the task of protecting minorities. As the Court explained in *Cleburne*, strict scrutiny also relies on the fact that “such discrimination is unlikely to be soon rectified by legislative means.”<sup>136</sup> In fact, the Take Care Clause, even in its weakest form, supports the notion that the President may have to be proactive in response to the deference that the Court might otherwise show to Congress. And third, separation-of-powers principles remain: one need not be a strong departmentalist to recognize judicial supremacy—that the Court gets the final say—while also recognizing the influence of persuasive advocacy to help the Court understand changed circumstances and their relevance.<sup>137</sup>

These last two points are delicately intertwined: the Court both defers—thereby possibly permitting Congress to violate the Constitution—as well as looks to popular and executive constitutionalism to help it interpret the Constitution’s shifting meaning—thereby providing an opportunity for presidential advocacy.<sup>138</sup> Where changed societal circumstances suggest that

<sup>133</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

<sup>134</sup> *Id.* at 439.

<sup>135</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>136</sup> *Cleburne*, 473 U.S. at 440 (emphasis added).

<sup>137</sup> *Cf. Gorod, supra* note 61, at 1254 (“It would seem far better in some circumstances to recognize that the Executive Branch cannot always act for the whole and to allow many parties to offer their competing visions of what the Constitution allows and to let the courts make the final determination.”).

<sup>138</sup> See, e.g., TUSHNET, *supra* note 21, at 150 (explaining that the Court’s decision in *Romer* is “more interesting” because it “supported the gay rights position” than for its “legal analysis,” because the Court, no doubt aware of “high levels of support for the proposition that employers should not discriminate against gays and lesbians . . . was predicting the future”); see also Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2602 (2003) (“But what those who complain about judicial review often miss is that consistent with the concept of popular constitutionalism, the judicial veto necessarily must fall within a range acceptable to popular



rational basis is no longer the appropriate test, the burden falls on the political branches to act accordingly.<sup>139</sup> With Congress out of the equation, and the President unable to legislate (and unwilling not to enforce, given the resulting failure to create a justiciable controversy and the eventual election of another President), nondefense becomes the best choice.

## 2. The President's Responsibility to Alert the Court When Conditions Warrant Heightened Scrutiny

The assertion that the President has responsibility to take action where Congress and the Court have failed might appear, at first, to raise separations-of-powers concerns. Remember, however, that the action under consideration is not whether the President effectuates Congress's intent (at issue in nonenforcement decisions), but instead how the President directs the course of litigation (an executive branch responsibility).<sup>140</sup> This question arises when the President disagrees with what *Congress*—not the Court—says the Constitution means with regard to a statute: Congress has asserted one understanding, the President disagrees, and the Court has not yet addressed the question. Through nondefense, the Executive is the branch most responsible for, and competent at, advancing arguments against the statute's constitutionality.<sup>141</sup> Although better at retrospection, the Court has a particular blind spot in its rational basis standard,<sup>142</sup> which is too deferential

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judgment over time . . ."); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution?: The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 97 (1993) (finding empirically that the Court's 1956–1981 "decisions not only have conformed closely to the aggregate policy opinions of the American public but have thereby reinforced and helped legitimate emergent majoritarian concerns"); Post & Siegel, *supra* note 102, at 384 (noting that while "[t]he very practices that ensure the democratic accountability of the American constitutional system thus seem also to endanger the integrity of American constitutional law," the Court nonetheless seems to "accomplish[] this remarkable feat" of "incorporating popular beliefs into the domain of legality").

<sup>139</sup> Cf., e.g., Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 517–18 (2005) ("In the American constitutional machine, which does not quite 'run of itself,' courts have long been viewed as rights-protecting, institutional brakes, while Executive departments and administrative agencies are institutional accelerators.").

<sup>140</sup> See 28 U.S.C. § 516 (2006) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

<sup>141</sup> For a discussion of whom the executive branch serves—i.e., who is the principal and who is the agent: Congress, the President, or the People?—see generally Gorod, *supra* note 61, at 1228–35.

<sup>142</sup> See *supra* notes 54 & 100; see also Richard H. Fallon, *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 64 (1997) ("[T]he Court does not always frame constitutional doctrine to ensure that constitutional values are protected to the

to a Congress that is now testing the very limits of this deference through the objectionable statute. Here, the Court's standard has failed to keep pace with society's understandings of equality, and the concern is that the Court is unlikely to raise the question *sua sponte* of whether it should adopt stricter scrutiny towards the statute<sup>143</sup>—scrutiny necessary to reach the correct outcome—if the President does not intervene.<sup>144</sup>

The President has institutional competence that the Court lacks in the form of prospective factfinding capabilities.<sup>145</sup> Unlike a court, the President is not bound to consider only those matters that the parties have brought before him or those which are properly susceptible of judicial notice.<sup>146</sup> Rather, where the Court has historically deferred to the elected legislature and where the legislature has not only failed to act, but has taken arguably discriminatory action, the President's own assessment may reveal the injustice. In such circumstances, the President has the responsibility to take action on behalf

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fullest possible extent. . . . [S]ome constitutional tests reflect an implicit judgment that it would be too costly or unworkable in practice for courts to enforce all constitutional norms to their full conceptual limits." (internal quotation marks omitted)); James E. Fleming, *Securing Deliberative Democracy*, 72 FORDHAM L. REV. 1435, 1442 (2004) ("Certain constitutional norms . . . may be judicially underenforced because of the institutional limits of courts, and left to the political processes for fuller enforcement."). See generally Lawrence Sager, *Material Rights, Underenforcement, and the Adjudication Thesis*, 90 B.U. L. REV. 579 (2010) (defending the underenforcement theory).

<sup>143</sup> See Pillard, *supra* note 85, at 695 (discussing the importance of political branch action where the Court's standard is deferential); Sager, *supra* note 100, at 419 (arguing that the gap between constitutional case law and the Constitution provides a strong reason "for valuing popular participation in the definition and implementation of justice").

<sup>144</sup> As I describe below, the Solicitor General is able to exert an influence that private parties cannot. See *infra* subsection III.A.2.b.

<sup>145</sup> On comparative institutional competence, see Eisgruber, *supra* note 19, at 352 ("Interpretive authority belongs to the most competent branch (or branches). . . . It directs each branch to justify deference (or the lack of it) by first identifying the purposes served by the Constitution and then making a judgment about which institutions are best equipped to pursue that purpose."). On factfinding, see *infra* note 146 and accompanying text.

<sup>146</sup> Surely, courts do engage in their own factfinding, so they may not be limited even where the Executive does not exercise this institutional competence. See generally Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 25-37 (2011) (collecting examples of appellate courts looking outside the developed record on appeal "to point out the extent to which [courts rely] on extra-record facts in reaching their conclusion"); see also Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 971-72 (2009) (arguing that court decisions based on extra-record factfinding are "driven by evidence that the parties never explained and the meaning or importance of which they never contested"). But such factfinding may be neither uniform nor fair; rather, it is ad hoc and opaque, and so it may be adverse to both parties, as well as to the general public, which is bound by the resulting rule. See, e.g., Gorod, *supra*, at 9 ("Given this indeterminacy, it is problematic when such 'facts' are 'found' by ad hoc methods without the benefit of rigorous testing and then provide the basis for consequential legal decisions.").

of those denied equal protection of the laws, as he serves as the only official in our federal political system elected by a national constituency.

Four factors militate in favor of increased Executive authority in the equal protection domain. Historically, (1) the political branches have been influential in the Court's decisionmaking process; the deference that the Court shows the elected branches not only suggests that the President's involvement will help to shape the doctrine, but also that his involvement is entirely appropriate and may be necessary to help counterbalance the deference the Court might otherwise be inclined to show to Congress. Moreover, (2) the Executive has demonstrated its efficacy in shaping equal protection outcomes and, through the Office of the Solicitor General, is perhaps the single most influential litigant. Further, as an Executive representing *all* the nation's people,<sup>147</sup> the President is more responsive to shifts in opinion, mood, and circumstances, and can thus (3) bring democratic legitimacy to litigation and (4) reinforce the legitimacy of judicial resolution through political accountability and influence outside of court.<sup>148</sup> The argument for increased Executive authority in the equal protection context is fairly straightforward: Historically, the Executive has been effective in influencing the Court, the branch self-charged with protecting minority rights against the very majoritarian tyranny<sup>149</sup> evinced by Congress's decision to pass a statute that the President believes violates equal protection principles. The President's litigators may be able to help the Court see that it again needs to exercise that countermajoritarian muscle.

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<sup>147</sup> The Court has recognized the importance of the "national" perspective in the legislative process. See *INS v. Chadha*, 462 U.S. 919, 948 (1983) ("[I]t may be, at some times, on some subjects, that the President elected by all the people, is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . . ." (quoting *Myers v. United States*, 272 U.S. 52, 123 (1926) (internal quotation marks omitted))).

<sup>148</sup> Cf. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is . . ."); WHITTINGTON, *supra* note 63, at 21 (observing that the President, as a nationally-elected officer must be cognizant of maintaining a legislative coalition and thus "cannot be idiosyncratic in defining his agenda").

<sup>149</sup> See THE FEDERALIST NO. 10, at 60-61 (James Madison) (Jacob E. Cooke ed., 1961) ("When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. . . . Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.").

a. *Historical Influence of the Elected Branches on Litigation*

The elected branches can claim significant influence over the Court's interpretation of the Constitution's guarantee of equal protection. The extension of heightened scrutiny to sex as a protected class is a perfect example of the Court's deference to Congress in heightening its standard of review. In *Frontiero v. Richardson*, the plurality looked to congressional interpretations of the Equal Protection Clause under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and, finally, the passed (but unratified) Equal Rights Amendment (ERA), as significant interpretations of a "coequal branch."<sup>150</sup> Further, the plurality failed to secure the one additional vote it needed for a majority because Justice Powell preferred to defer to Congress and the People by waiting for the ERA's ratification.<sup>151</sup> Thus, while the ERA itself was never ratified by a sufficient number of states, the Court's subsequent jurisprudence resulted in a "de facto" ERA, with substantially the same provisions.<sup>152</sup>

Both the plurality's failure to secure an extra vote as well as the resulting "de facto" ERA evince the importance of elected-branch signaling in litigation. Justice Powell's refusal to join the majority demonstrates that Justices are concerned with legislative and popular interpretations of the Constitution; at the same time, the "de facto" ERA shows that "[t]he social changes that did not quite produce the Equal Rights Amendment" nonetheless moved the Court to "produce[] a de facto ERA in the Court's equal protection jurisprudence."<sup>153</sup> Proponents of the ERA had openly argued that influencing the Supreme Court was one of the objectives of the amendment process.<sup>154</sup> Their advocacy ultimately traced back to

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<sup>150</sup> *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality opinion) ("Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration." (emphasis added)).

<sup>151</sup> See *id.* at 692 (Powell, J., concurring in the judgment) (stating that the ERA provides a "compelling reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny" and arguing that the Court's "reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes" (internal punctuation omitted)).

<sup>152</sup> See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1368 (2006) (observing that the change "began in the executive branch, . . . spread to Congress, and then finally to the Courts" (emphasis added)).

<sup>153</sup> Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 984-85 (2002); see also Siegel, *supra* note 152, at 1332-39 (observing that, even though the Equal Rights Amendment was not ratified, many have seen it as successful because the Court has essentially adopted the standard it contained in cases whose "precepts . . . are now canonical").

<sup>154</sup> See Siegel, *supra* note 152, at 1368.

“[c]hange . . . in the executive branch, led by women convened by President Kennedy’s Commission on the Status of Women.”<sup>155</sup>

Another analogue is the Court’s recognition of the repeal of state sodomy laws in *Lawrence v. Texas*.<sup>156</sup> Overturning *Bowers v. Hardwick*,<sup>157</sup> the *Lawrence* Court noted that both state legislatures (through repeal) and state executives (through nonenforcement) had alerted it to changed circumstances.<sup>158</sup> Similarly, the Court has also indicated its receptivity to agency decisionmaking as constitutional interpretation.<sup>159</sup> As Gillian Metzger points out, in some contexts, “specific administrative mechanisms are not constitutionally mandated but suffice to avoid constitutional violations.”<sup>160</sup> For example, as in *Wilkie v. Robbins*, when administrative complaint systems are robust enough, their existence can militate against the Court’s implication of a *Bivens* cause of action for a plaintiff seeking redress for constitutional violations by federal officials.<sup>161</sup>

The influence of the elected branches on doctrine can be significant. The examples discussed here, and in the discussion of due process and welfare rights cases above,<sup>162</sup> suggest that the Court, concerned about its democratic legitimacy, will often look to an elected branch to take the first steps. When Congress will not, the President may have to lead by example.

#### b. *The Executive as Litigator*

Unlike Congress and most federal agencies, the President, through the DOJ and the Solicitor General, is already a litigator—and an effective

<sup>155</sup> *Id.*

<sup>156</sup> See 539 U.S. 558, 578–79 (2003) (holding that a law criminalizing same-sex intercourse violated the Due Process Clause).

<sup>157</sup> See 478 U.S. 186 (1986) (upholding a state law criminalizing sodomy).

<sup>158</sup> See 539 U.S. at 573 (“The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, . . . there is a pattern of nonenforcement.”).

<sup>159</sup> Gillian Metzger argues that agencies, knowledgeable about the regulatory schemes they enforce, are capable of effectively enforcing constitutional norms. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 497–505 (2010). He points to cases where the underenforcement of constitutional rights passes the opportunity for realization of the Constitution to administrative agencies. *Id.* at 500.

<sup>160</sup> *Id.* at 488.

<sup>161</sup> 551 U.S. 537 (2007). Professor Metzger cites to *Wilkie*, in which the Court held that finding an implied private right of action based on the Court’s previous holding in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971), would be inappropriate, because administrative remedies were available. Metzger, *supra* note 159, at 488 n.28 (citing *Wilkie*, 551 U.S. at 552–53). *But see supra* note 112 and accompanying text.

<sup>162</sup> See *supra* subsection III.A.1.a.

one.<sup>163</sup> Therefore, through nondefense, he has a unique structural institutional competence over Congress in alerting the Court to a statute's unconstitutionality. The DOJ's position-taking may even help encourage plaintiffs to bring further cases, and thus create the kind of national legal issue that will make the case all the more appealing to the Supreme Court.<sup>164</sup>

Once litigation rises to the Supreme Court, the Solicitor General has advantages shared by few other litigators. He is more likely than any other actor to secure Supreme Court review, and also to win once certiorari is granted.<sup>165</sup> As Ryan Black and Ryan Owens have found in their empirical study of the Office of the Solicitor General's (OSG) success at the Supreme Court, the data "points to considerable Solicitor General influence over Supreme Court opinions."<sup>166</sup> Statistically ruling out explanations of better Solicitor General experience or strategic case selection,<sup>167</sup> Black and Owens concluded that "the Court borrows more from OSG briefs because it trusts the professional judgment of the lawyers within that office," and "that the OSG is indeed influential before the Court."<sup>168</sup> The OSG's recommendation makes it considerably more likely that the Court will "treat . . . precedent favorably"; likewise, a negative OSG recommendation makes it far more likely that the Court will "negatively treat precedent by distinguishing it or overruling it."<sup>169</sup> Based on a comprehensive literature review and their own statistical results, Owens and Black concluded that "OSG recommendations, in short, drive doctrinal change."<sup>170</sup> These findings are relevant because they suggest that through the Solicitor General, the President can hope not simply to *predict* the course of the Court's doctrine—and whether it will adequately protect minorities from majoritarian tyranny—but also to *influence* those judicial outcomes that he must accept as law. And he can hope to do so in a way that private litigants simply cannot.

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<sup>163</sup> See, e.g., Gorod, *supra* note 61, at 1212.

<sup>164</sup> See *supra* note 82.

<sup>165</sup> See BLACK & OWENS, *supra* note 64, at 23.

<sup>166</sup> *Id.* at 111.

<sup>167</sup> See *id.* at 111-12 ("If the OSG were so successful before the Court because its attorneys have more experience than non-OSG attorneys, we would have observed the Court borrowing the same amount of language from OSG briefs and non-OSG briefs when matching on attorney experience. . . . [And p]ut plainly, if the OSG were picking cases strategically that it knew it would win, we would not retrieve the results our models produced.").

<sup>168</sup> *Id.* at 112.

<sup>169</sup> *Id.* at 132-33.

<sup>170</sup> *Id.* at 133; see also Lincoln Caplan, *The President's Lawyer, and the Court's*, N.Y. TIMES, May 18, 2001, at A19 ("The Supreme Court has bestowed on the [S]olicitor [G]eneral a special status—seeking the [S]olicitor General's] advice in many cases where the government isn't even a party. And the [S]olicitor General] has reciprocated by fulfilling a special role in court.").

History, too, instructs on the power of presidential involvement in litigation, even before it reaches the Supreme Court. Presidents Truman's and Kennedy's DOJ's were very active in influencing the Court's equal protection decisions from the 1940s through the 1960s, but these efforts began long before the controversies reached the Justices.<sup>171</sup> For instance, in *Simkins v. Moses H. Cone Memorial Hospital*, the Attorney General's tactic of supporting the plaintiffs in attacking a federal law tolerating segregated hospital facilities helped move the Fourth Circuit to strike down the law.<sup>172</sup> *Simkins* followed a long tradition of Cold War agenda-setting before the Court by President Truman's DOJ,<sup>173</sup> which began its campaign with an amicus brief in *Shelley v. Kraemer*,<sup>174</sup> in which the Court held that state action to enforce a racially discriminatory restrictive covenant violated the Equal Protection Clause.<sup>175</sup> After the President's Committee on Civil Rights advanced three reasons—moral, economic, and international—for redressing civil rights abuses,<sup>176</sup> President Truman, concerned about the international perception of racism in America and finding that he could not count on Congress to address these problems, directed the DOJ to argue his position to the Court.<sup>177</sup> Thus, the movement that began with invalidating discriminatory restrictive covenants moved on to tackle “international implications of segregation” with the DOJ's involvement in opposing the discriminatory position of the Interstate Commerce Commission<sup>178</sup> in *Henderson v. United States*.<sup>179</sup> Eventually, the DOJ participated in *Sweatt v. Painter*,<sup>180</sup> *McLaurin v. Oklahoma State Regents for Higher Education*,<sup>181</sup> *Brown v. Board of Educa-*

<sup>171</sup> See generally DUDZIAK, *supra* note 119, at 90-106, 178-202.

<sup>172</sup> 323 F.2d 959, 969 (4th Cir. 1963); see also P. Preston Reynolds, *Professional and Hospital Discrimination and the U.S. Court of Appeals: Fourth Circuit 1956-1967*, 94 AM. J. PUB. HEALTH 710, 713 (describing the Justice Department's stance in support of the plaintiffs' successful contention that the use of federal funds in a discriminatory manner is unconstitutional).

<sup>173</sup> See DUDZIAK, *supra* note 119, at 90-106.

<sup>174</sup> See Brief for the United States as Amicus Curiae, *Shelley v. Kramer*, 334 U.S. 1 (1948) (Nos. 72, 87, 290 & 291).

<sup>175</sup> *Shelley*, 334 U.S. at 23.

<sup>176</sup> See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 101-02 (1988) (describing how President Truman took important steps towards racial equality by desegregating the military by Executive order).

<sup>177</sup> *Id.* at 103-05.

<sup>178</sup> *Id.* at 106.

<sup>179</sup> See 339 U.S. 816, 826 (1950) (holding that segregation in railroad cars violated the Interstate Commerce Act).

<sup>180</sup> See 339 U.S. 629, 635-36 (1950) (striking down, as violative of the Fourteenth Amendment, Texas's policy prohibiting blacks from attending an all-white law school).

<sup>181</sup> See 339 U.S. 637, 641-42 (1950) (holding that, under the Fourteenth Amendment, a black graduate student was entitled to equal treatment from a state-supported school as students of other races).

tion,<sup>182</sup> and *Bolling v. Sharpe*.<sup>183</sup> Just as Robin West argues that Congress “exists to do distributive justice” by enacting the “aspirational Constitution,”<sup>184</sup> the President could be said to exist (at least in part) to do distributive justice by *litigating* the aspirational Constitution. And in those rare cases in which the Solicitor General raises the President’s concerns with a statute’s constitutionality, the Court listens.<sup>185</sup>

Finally, the President has other capabilities well suited for alerting the Court to the need for a heightened standard of review. Through his command of the Executive Branch, he can move faster than either Congress<sup>186</sup> or litigation. This increased speed can help to ameliorate deprivations that subject minorities to continuous harm.<sup>187</sup> Similarly, his nondefense decision can give the DOJ and other agencies the space they need to read the Constitution broadly and assert such expansive arguments in and out of court.<sup>188</sup> President Kennedy, for instance, issued an Executive order declaring discrimination in federal employment and contracting unconstitutional, establishing the President’s Committee on Equal Employment Opportunity, and directing agencies “to initiate forthwith studies of current government employment practices within their responsibility.”<sup>189</sup> A year later, Kennedy issued another order, requiring “all [relevant] departments and agencies in the executive branch . . . to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin” in housing, and appointing a Committee to oversee agency progress.<sup>190</sup> At first glance, this analogue to the nondefense context seems

<sup>182</sup> See 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

<sup>183</sup> See 347 U.S. 497, 499-500 (1954) (extending *Brown*’s holding to the District of Columbia under the equal protection component of the Due Process Clause).

<sup>184</sup> ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 311-12 (1994).

<sup>185</sup> See, e.g., Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1081-83 (2001).

<sup>186</sup> Consider the problem of the filibuster: “sixty votes . . . are commonly required to enact major and controversial legislation.” WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 272 (8th ed. 2011).

<sup>187</sup> See Pillard, *supra* note 85, at 689 (“[E]ven where private parties can get courts to respond to their constitutional harms, they may face interstitial deprivations. Individuals suffer injury in the time lag between constitutional harm and relevant judicial response.”).

<sup>188</sup> For example, President Kennedy encouraged the Federal Communications Commission to affirmatively read the Constitution to apply equal employment opportunity policies against the broadcasters it regulated, even as the FCC continued to receive a “cool reception” from most of the rest of the federal government. See Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 811-12, 820 (2010).

<sup>189</sup> Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

<sup>190</sup> Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962).



imperfect, since nondefense involves slow-moving litigation. However, the fact that the President can move swiftly through other, nonlitigation channels means that he can coordinate policy, repeal, and public outreach efforts with nondefense—a strategy unavailable to Congress. In turn, these efforts have the potential to make litigation efforts themselves more effective.<sup>191</sup>

Once litigation has begun, the President's institutional capacity to act swiftly comes into play yet again as a tool for elaborating constitutional law. If the President is convinced that a statute violates equal protection, then the DOJ can push for recognition of rights and equality, as it did in its lower-court litigation in *Plyler v. Doe*.<sup>192</sup> And he can push the DOJ and Solicitor General to take consistent positions to help ensure that the issue reaches the Supreme Court.<sup>193</sup> Indeed, his nondefense decision is important because it may help push the Supreme Court to accept his view when it might otherwise remain deferential to an intransigent Congress through the rational basis standard.

### c. *Bringing Democratic Legitimacy to Litigation*

The democratic legitimacy of the President bolsters his authority,<sup>194</sup> and especially so given the Court's receptiveness to changing notions of equal protection.<sup>195</sup> The Executive's institutional competence as a litigator and the President's national constituency render the Executive the best branch for signaling to the Court that it should change its standard of review. Indeed, the Executive is the only branch capable of doing so—if the desired change

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<sup>191</sup> See Pillard, *supra* note 85, at 749 (noting that, unlike the courts, the elected branches have institutional competencies in “agenda-setting and factfinding,” and the executive branch also has capacity to “prioritize, lead, and set an example for other political officials”).

<sup>192</sup> *Doe v. Plyler*, 458 F. Supp. 569, 593 (E.D. Tex. 1978) (holding that denying education to children of illegal immigrants violates the Equal Protection Clause), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982). The DOJ dropped its equal protection arguments in its amicus brief at the Supreme Court, because of its “view that this is an issue that affects state rather than federal interests.” Brief for the United States as Amicus Curiae at 5 n.3, *Plyler v. Doe*, 457 U.S. 202 (1982) (Nos. 80-1538 & 80-1934).

<sup>193</sup> See *infra* Part IV.C; see also Solicitor General's *Massachusetts* Certiorari Petition, *supra* note 132, at 12 (“[W]e respectfully seek this Court's review so that the question may be authoritatively decided by this Court. . . . [T]o ensure that the Judiciary is the final arbiter of Section 3 [of DOMA]'s constitutionality, the President has instructed Executive departments and agencies to continue to enforce Section 3 until there is a definitive judicial ruling that Section 3 is unconstitutional.”); Petition for a Writ of Certiorari Before Judgment at 10, Office of Pers. Mgmt. v. Golinski, No. 12-16 (U.S. July 3, 2012) (same) available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-16-Golinski-Petition-final.pdf>.

<sup>194</sup> By contrast, scholars note that the Court lacks democratic legitimacy. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1391 (2006) (explaining that legislators, unlike judges, are accountable to their constituents).

<sup>195</sup> See *supra* subsection III.A.1.

would ratchet up the level of scrutiny—when Congress is acting unconstitutionally. Unlike Congress, the President can combine nondefense in the courts with position-taking outside the courts.<sup>196</sup> Specifically, he can urge repeal of the offending statute, release public statements, issue Executive orders, and, in the process, foster dialogue that helps repopularize the democratic process.<sup>197</sup> To a degree, these actions may help assuage the Court's concerns that striking down a statute—a countermajoritarian act—is antidemocratic. If the President ultimately influences the Court's decision and also fosters popular dialogue about the provision at issue, then the President will have, in a sense, helped to democratize and aspirationalize the Constitution.

d. *The President's Accountability Outside the Courtroom*

While in-court advocacy is consistent with the President's political role,<sup>198</sup> the President's out-of-court advocacy deserves further attention. As a political actor, he can also seek to change hearts and minds<sup>199</sup> in ways that the Court cannot.<sup>200</sup> And the President is politically accountable when he

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<sup>196</sup> See, e.g., WHITTINGTON, *supra* note 63, at 98-100 (noting that "[e]lected officials can encourage appropriate judicial action through . . . public statements" and providing examples).

<sup>197</sup> Cf. KRAMER, *supra* note 27, at 227-48 (arguing for a return to the popular constitutionalism of the Founding Generation). Perhaps this argument is simply a restatement of the notion that, given the Framers' intended checks and balances, the President should check the legislature by making his own constitutional interpretations.

<sup>198</sup> See Carlos A. Ball, *When May A President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 89 (2011) (arguing that, when the constitutional question involves assessing whether the targeted group has long suffered "invidious discrimination" irrelevant to ability, the President confronts "broad normative and policy questions that should give [him] greater . . . authority to make independent constitutional assessments").

<sup>199</sup> E.g., Remarks on Affirmative Action at the National Archives and Records Administration, 2 PUB. PAPERS 1106 (July 19, 1995). President Clinton asked:

How did this [progress in confronting racism] happen? Fundamentally, because we opened our hearts and minds and changed our ways. But not without pressure—the pressure of court decisions, legislation, Executive action, and the power of examples in the public and private sector. Along the way we learned that laws alone do not change society; that old habits and thinking patterns are deeply ingrained and die hard; that more is required to really open the doors of opportunity.

*Id.* at 1108.

<sup>200</sup> The aftermath of *Brown* revealed that changed hearts and minds do not necessarily result from legal rulings. See, e.g., PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 404-05 (1999) (describing Eisenhower's eventual decision to use troops to enforce *Brown*'s holding and stop the constitutional violation of ongoing segregation at an Arkansas public high school).

decides not to defend a statute.<sup>201</sup> He can always do nothing, and in essence tell constituents either to turn to Congress or to rely solely on the courts. But as the official with the broadest constituency, he can also speak with a political voice.

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The bottom line is that, where the Court underenforces the Constitution—whether with regard to procedural due process for welfare benefits, the First Amendment, or equal protection under a rational basis standard—the Executive and Legislative branches retain the power to interpret the Constitution above the floor that the Court has established.<sup>202</sup> But sometimes Congress not only fails to erect an adequate ceiling—that is, by extending rights or entitlements above and beyond what the Constitution requires—but also digs into the floor’s very foundations by enacting a statute depriving some minority of the equal protection of the laws. In such circumstances, the Executive bears the responsibility of persuading the Court to elevate its level of scrutiny from rational basis to a heightened standard. This responsibility is especially acute where the questionable classification resembles race and sex in its immutability. Nondefense appropriately responds to the gravity of denying minorities the equal protection of the laws by increasing the probability that the Court will hear the case and address the ongoing deprivation of individuals’ rights.

### B. *A New Model for Nondefense Decisionmaking*

In this Section, I present my modifications to the Dellinger/Johnsen framework for the equal protection context. I begin by explaining why a new model is necessary. Even the weakest argument for these modifications reveals the need for a new decisionmaking framework: The President who must decide whether to defend a statute he believes should receive, and would fail, heightened equal protection scrutiny requires a decisional framework. So long as it is reliable, and all else being equal, the standard

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<sup>201</sup> See Gorod, *supra* note 61, at 1243–44 (explaining that the public will often “assume that the views the Executive Branch is expressing are its own,” so “forcing the Executive Branch to make arguments in which it does not believe—or prohibiting it from making affirmative arguments in which it does—hurts the President’s ability to effectively use his office as a bully pulpit”); Rao, *supra* note 21, at 553 (pointing out that the People can hold the President accountable if they disagree with his decision not to enforce a statute).

<sup>202</sup> Cf. Strauss, *supra* note 21, at 114 (“[A]s the judicial definition is taking shape, there is nonetheless substantial legitimate room for the executive branch to assert and persist in its own readings of legal authority.”).

that gives him the most guidance will also be the most helpful. After demonstrating the usefulness of these modifications, I present the additional questions that constitute the modified model. Finally, as a thought experiment to address the concerns raised earlier in the Section, I offer how the model would impact a nondefense decision *outside* the equal protection context.

### 1. Why a New Model is Necessary

I propose modifications to the Dellinger/Johnsen model for two primary reasons. First, while I have argued that Dellinger's nonenforcement framework can be adapted to the nondefense context, the foregoing discussion reveals that there are concerns that are particularly salient in the equal protection context: the President has both the responsibility and the ability to help influence the Court's development of equal protection jurisprudence that protects minorities who have experienced pervasive discrimination. The modified model that I propose better accounts for those instances in which the President believes that the Court should apply heightened scrutiny to find a statute unconstitutional under the Equal Protection Clause.

Concededly, Dellinger's model is able to accommodate equal protection cases. In fact, in 1996, Dellinger advised President Clinton not to defend a statute that would require the discharge of all HIV-positive members of the military on equal protection grounds.<sup>203</sup> Clinton accepted this advice after conferring with the Joint Chiefs of Staff and concluding that "the provision does not serve any valid military or other purpose." He resolved that the DOJ would not defend its constitutionality if it was challenged in litigation.<sup>204</sup>

There, however, Assistant Attorney General Dellinger and Counsel to the President Jack Quinn relied on an argument based on rational basis review.<sup>205</sup> It was not, according to their reasoning, a circumstance in which the Court should apply heightened scrutiny; the statute did not classify on the basis of an arguably innate, immutable condition. Similarly, of the historical nondefense decisions to which Dellinger could point, only

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<sup>203</sup> See Quinn & Dellinger, *supra* note 75 (statement of Walter Dellinger).

<sup>204</sup> *Id.*

<sup>205</sup> See *id.* (statement of Jack Quinn) ("[T]he question the courts ask is, is there a rational basis for this discrimination? Does it serve some valid, legitimate, rational government objective? The people to whom that question is properly put by the President are the Secretary of Defense and the Chairman of the Joint Chiefs.").

*Simkins*<sup>206</sup> and *Gavett v. Alexander*<sup>207</sup> involved equal protection issues, and only *Simkins* addressed a standard more searching than rational basis.<sup>208</sup>

Therefore, the nondefense decisionmaking model deserves further elaboration for situations implicating equal protection concerns, where the Court might employ a standard too deferential toward Congress—i.e., rational basis review instead of heightened scrutiny. The modifications I suggest would help a decisionmaker appropriately balance important separation-of-powers concerns with alleged infringements of individual rights. They also help point the way toward actions the President can take to further the democratic legitimacy of an eventual nondefense posture.

Second, these modifications serve to highlight the *sui generis* nature of presidential nondefense decisions in that subset of equal protection cases where the President believes that the Court should apply heightened scrutiny. Crucially, the inquiry, as a whole, can serve as a limiting principle for Presidents who, in the words of Orin Kerr, would like “a great deal of power to decide what legislation to defend, increasing executive branch power at the expense of Congress’s power. . . . [I]t will be a power grab disguised as academic constitutional interpretation.”<sup>209</sup> My proposed modifications impel the President to ask *more* questions, not fewer, and exhort him to justify, more comprehensively, an ultimate decision not to defend a statute. Moreover, because they focus on the equal protection context, the modifications mitigate slippery slope arguments against non-defense, namely that future Presidents could assert the authority not to enforce laws, such as the Affordable Care Act, based on policy disagreements expressed as Commerce Clause jurisprudence.<sup>210</sup> My additional

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<sup>206</sup> See *supra* note 172 and accompanying text.

<sup>207</sup> 477 F. Supp. 1035, 1043-44 (D.D.C. 1979) (noting a DOJ decision not to defend a statute and staying litigation for forty-five days, to enable congressional intervention).

<sup>208</sup> See Letter from Andrew Fois, Ass’t Att’y Gen., U.S. Dep’t of Justice, to Sen. Orrin G. Hatch (Mar. 22, 1996), reprinted in 1 J.L. (1 PUB. L. MISC.) 19, 22-27 (2011), <http://journaloflaw.us/o%20JoL/1-1/Jol1-1.pdf> (listing the cases in which the DOJ declined to defend the constitutionality of a statute).

<sup>209</sup> Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, VOLOKH CONSPIRACY (Feb. 23, 2011, 3:49 PM), <http://volokh.com/2011/02/23/the-Executive-power-grab-in-the-decision-not-to-defend-doma>; see also Richard Epstein, *Dumb on DOMA*, RICOCHET (Feb. 23, 2011, 1:04 PM), <http://ricochet.com/main-feed/Dumb-on-DOMA> (“[T]he choice of the President to surrender unilaterally (which could have been anticipated from his earlier actions) makes it unclear whether any private party has standing to defend DOMA. . . . This action therefore could lead to a constitutional crisis of some significance.”).

<sup>210</sup> See Igor Volsky, *Rick Perry Fails Govt 101: Claims Executive Orders Can Repeal Laws Passed by Congress*, THINKPROGRESS (Dec. 3, 2011, 9:08 PM), <http://thinkprogress.org/health/2011/12/03/381485/rick-perry-failed-govt-101-claims-Executive-orders-can-repeal-laws-passed-by-congress> (“Rick Perry repeatedly insisted that the President has the authority to block the implementation of the Affordable Care Act, despite a recent Congressional Research Service report finding to the

questions are uniquely solicitous toward nondefense decisions responding to the *Carolene Products* concerns discussed earlier,<sup>211</sup> and serve as a constant reminder to the President that, by contrast, he should be hesitant to make nondefense decisions in other contexts.

Similarly, would the consideration of whether to defend the constitutionality of a statute result in a different decision under Dellinger's framework than under my framework, in either an equal protection or a *non*-equal protection case? I offer three observations in light of the modifications I propose below. First, regardless of whether the President would make a different *decision* under Dellinger's model than under my modifications, the modifications should influence the manner in which he carries out the decisionmaking process and its aftermath. For instance, while President Obama would likely have decided not to defend DOMA under either framework, my suggestions push the President toward the provision of more *extensive* justifications for his position, both in the courts and to the public. Second, as I discuss below in subsection III.B.3, my framework also helps to shed light on potential nondefense decisions *outside* the equal protection context. Finally, the additional value of my elaborated factors becomes clearer in Part IV, where I apply the model to President Obama's decision not to defend DOMA. If nothing else, the suggestions I provide elaborate the decisional framework for a President who needs core principles to guide him in making his nondefense decision.

## 2. The Modified Model

Some guiding questions help to address the concerns discussed above. First, did Congress itself consider the constitutionality of the statute in question?<sup>212</sup> If so, how does its analysis compare with one the Court might undertake, especially given changed circumstances? Next, is the President taking other actions, such as publicly advancing his reasoning, to make

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contrary."); see also Kerr, *supra* note 209 (expressing concern that "the Executive Branch [will] essentially ha[ve] the power to decide what legislation it will defend based on whatever views of the Constitution are popular or associated with that Administration."). Obviously, the Commerce Clause question in the Affordable Care Act case did not raise *Carolene Products* concerns. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2616-17 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (explaining that "we owe a large measure of respect to Congress when it frames and enacts economic and social legislation"). For more on the intersection of politics, policy, and law, see generally, for example, Paul D. Clement, *The Intra-Executive Separation of Powers*, 59 EMORY L.J. 311, 317 (2009); Gorod, *supra* note 61, at 1246; and Meltzer, *supra* note 10, at 1214. See also generally *supra* note 12.

<sup>211</sup> See *supra* Section III.A.

<sup>212</sup> Cf. Johnsen, *supra* note 49, at 35 (explaining that evidence of such consideration by Congress should be relevant to the President's enforcement decision).

nondefense effective and himself politically accountable? Additionally, have lower courts considered the constitutionality of the provision, and if so, how do their analyses impact the President's evaluation of any changed circumstances?

To address the foregoing questions, I propose the following new model for presidential nondefense of statutes. It begins, like the Dellinger/Johnsen model, with the understanding that the President will sometimes need to make his own interpretations under the Take Care Clause.<sup>213</sup> Second, while the President should endeavor to correct unconstitutional provisions through the legislative process, he should also ask whether repeal would deprive the issue of judicial resolution.<sup>214</sup>

Third, when considering the offending provision's constitutionality, the President should employ a standard more searching than the Supreme Court's rational basis standard. The focus here should be on examining what Congress did and thoroughly exploring why it did so—and whether the reasons proffered truly justify its objectives.<sup>215</sup> At this point, the inquiry should not yet turn to which level of scrutiny the Court would or should apply—with all the baggage that a level of judicial scrutiny carries.<sup>216</sup> Why not simply use the heightened scrutiny test? The President should move away—even if only a short distance—from the narrow confines of the Court's three-tiered equal protection jurisprudence: the whole point of nondefense is that simply applying a certain tier of judicial scrutiny, in this case rational basis, will not always suffice. While the judgment regarding an

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<sup>213</sup> See *supra* Section II.A; see also Devins & Prakash, *supra* note 10, at 523 (“[E]ven as Article II requires faithful execution of constitutional laws, it forbids the Executive from executing unconstitutional ones.” (footnote omitted)).

<sup>214</sup> The ramifications of this inquiry are outside the scope of this Comment. However, repeal of a discriminatory act will not necessarily end discrimination based on the same classification by either the federal government or state governments. Thus, I suggest that the President at least assess the added value in choosing not to defend an unconstitutional provision, rather than only seeking to have it repealed.

<sup>215</sup> Consider, for instance, the standard that the Court has adopted under the Administrative Procedure Act's “arbitrary and capricious” provision. See 5 U.S.C. § 706(2)(A) (2006) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”). In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the Court explained that when a plaintiff challenges an agency's regulation under the Administrative Procedure Act, the agency has the burden of justifying its rule based on the *actual* reasons it considered in deciding to adopt the rule—the agency's actual contemporaneous rationality. 463 U.S. 29, 42–44, 43 n.9, 50 (1983). Whereas under rational basis review, Congress might be able to adduce reasons to support its decision after the fact, an agency bears the burden of demonstrating that its actual reasoning, contemporaneous with its decision, supports that decision. *Id.* at 50.

<sup>216</sup> See *supra* notes 130 & 131 and accompanying text.

offending provision's constitutionality is ultimately a legal one, some judges and Justices may not yet understand why a different tier should apply.<sup>217</sup>

Thus, I would instead incorporate simple actual contemporaneous rationality review into the President's nondefense decisionmaking framework. I would clarify that it must not be "toothless,"<sup>218</sup> and it should be adjusted upward where the equal protection considerations of immutability and "prejudice against discrete and insular minorities"<sup>219</sup> suggest that some form of heightened scrutiny is appropriate. In calibrating his own scrutiny level, the President should consider whether individuals in the group Congress has classified have been "subjected to discrimination," whether they "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group," and whether they are "a minority or politically powerless."<sup>220</sup> Even where these criteria are less than fully fulfilled, the President should act on the basis that objectives such as "'a bare . . . desire to harm a politically unpopular group' are not legitimate state interests," nor are "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable."<sup>221</sup> These considerations will allow him to better assess the *Carolene Products* concerns discussed above.<sup>222</sup>

To the assessment of these factors, the President should bring his institutional factfinding capacity to bear. He should ask whether circumstances have changed and examine shifts in social indicators and lower court interpretations (and the Supreme Court's interpretations, even if they are simply suggestive), as well as assess the magnitude of the ongoing harm caused by the offending provision. The contemporaneousness component of this standard would ensure that the President explored any animosity on the part of Congress that might have infected the statute and that the

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<sup>217</sup> Cf. Conversation with Walter Dellinger, Partner, O'Melveny & Myers LLP (July 13, 2012) (questioning why the executive branch should be bound by the way that courts think about the constitutional guarantee of equal protection).

<sup>218</sup> See *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (qualifying the rational basis standard).

<sup>219</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360-61 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("[R]ace, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside. . . . '[L]egal burdens should bear some relationship to individual responsibility or wrongdoing,' and . . . advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual." (citations omitted)).

<sup>220</sup> *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

<sup>221</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447, 448 (1985) (alteration in original) (citation omitted).

<sup>222</sup> See *supra* Section III.A.



justifications proffered for the provision were consistent with changing notions of equality. In other words, the President should ask what *actually* motivated Congress at the time it passed the offending statute, in addition to whatever reasonable arguments might support the statute after the fact.

This point is consistent with the fourth point, that while the President should consider what the Court would do, he should ask the question less with a predictive tenor, and more with a normative strategic thrust. Nondefense is an opportunity for the President to assert his better view of the offending provision's constitutionality (i.e., better than the judgment he *predicts* the Court will make), with the intention of persuading the Court to adopt that view. Thus, even if there might be nonfrivolous rational basis arguments supporting the constitutionality of the offending statute, the DOJ need not raise them if the President believes that heightened scrutiny should apply—he need not undermine his argument that a more searching standard is required by arguing, essentially, in the alternative.<sup>223</sup>

Fifth, he should continue to seek judicial review of the issue by instructing the DOJ to flesh out his nondefense arguments in litigation, appealing district or appellate rulings (even those agreeing with his arguments),<sup>224</sup> producing a publicly available advisory opinion, and taking his case to the court of public opinion.

In combination, these considerations will provide the President with more robust guidance when he makes his nondefense decision and should, in turn, lead him to the right result more often.

### 3. Nondefense Decisions Outside the Equal Protection Context

As a practical matter, the President has little reason to be personally concerned with deciding whether to enforce or defend every allegedly unconstitutional statute on the books during his administration. The Dellinger/Johnsen framework relies, to a large degree, on there being few

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<sup>223</sup> But see Conversation with Walter Dellinger, *supra* note 217. Dellinger points out that, with the Holder Letter, the DOJ had not flatly refused to defend DOMA, nor should it have; the DOJ could simultaneously take the position that heightened scrutiny is the right standard and DOMA cannot survive it, but that it would defend it under rational basis scrutiny. *Id.*; see also Holder Letter, *supra* note 2 (“If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3’s constitutionality may be proffered under that permissive standard.”).

<sup>224</sup> The DOJ should be able to appeal a loss even if it agrees with the plaintiff. See *INS v. Chadha*, 462 U.S. 919, 939 (1983) (“[T]he INS’s agreement with the Court of Appeals’ decision that [the statute] is unconstitutional does not affect that agency’s ‘aggrieved’ status for purposes of appealing that decision.”).

statutes that will clearly present significant and serious constitutional questions. This subsection briefly addresses what a President might do when there is a very strong argument that a statute is facially unconstitutional for reasons other than violation of equal protection principles.

The case of *United States v. Alvarez*<sup>225</sup> serves as a hypothetical for how this framework could work in the First Amendment context. There, the Ninth Circuit addressed the facial constitutionality of 18 U.S.C. § 704(b), which made it a crime for a person to “falsely represent[] himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”<sup>226</sup> The court observed that “Alvarez was not prosecuted for impersonating a military officer, or lying under oath, or making false statements in order to unlawfully obtain benefits. There was not even a requirement the government prove he intended to mislead. He was prosecuted simply for saying something that was not true.”<sup>227</sup> Because lying, without more, does not fit into one of the few categories of speech excepted from First Amendment protection, and because § 704(b) did not otherwise pass strict scrutiny, the Ninth Circuit struck down the provision as facially unconstitutional.<sup>228</sup>

The President instructed neither the DOJ nor the Solicitor General not to defend the statute. Nonetheless, the constitutional infirmity of § 704(b) seemed fairly clear. Under the rigorous First Amendment jurisprudence, “[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”<sup>229</sup> When the government’s restriction is content-based, the government must either show that the speech in question fits into “a few limited,” narrow, and well-defined historical categories, or that the regulation passes strict scrutiny.<sup>230</sup> Outside the context of false commercial speech, lies, in and of themselves, have never been one of these categories, and the Court has been extremely

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<sup>225</sup> 617 F.3d 1198 (9th Cir. 2010) (*Alvarez I*), *reh’g en banc denied*, 638 F.3d 666 (2011) (*Alvarez II*), *aff’d*, 132 S. Ct. 2537 (2012) (*Alvarez III*).

<sup>226</sup> 18 U.S.C. § 704(b) (2006), *declared unconstitutional by Alvarez III*, 132 S. Ct. 2537.

<sup>227</sup> *Alvarez I*, 617 F.3d at 1218.

<sup>228</sup> *Id.* The Ninth Circuit declined to rehear the case en banc. *See Alvarez II*, 638 F.3d 666. Chief Judge Kozinski explained, “Without the robust protection of the First Amendment, the white lies, exaggeration and deception that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as ‘*rational basis review*.’” *Id.* at 673 (Kozinski, C.J., concurring in the denial of rehearing en banc) (emphasis added).

<sup>229</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000).

<sup>230</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733–34 (2011).

resistant to recognizing any previously unrecognized categories.<sup>231</sup> Since § 704(b) did not fit any such categories, the question seemed to become whether it passed strict scrutiny, and “[i]t is rare that a regulation restricting speech because of its content will *ever* be permissible.”<sup>232</sup> In *Alvarez*, the Ninth Circuit quickly dismissed any such argument that § 704(b) would pass strict scrutiny.<sup>233</sup>

If President Obama had applied Dellinger’s framework, he might have asked what the Court was *likely* to do. He would have been on strong footing, supported by an appellate decision, despite another to the contrary,<sup>234</sup> in asserting that § 704(b) was unconstitutional. He might thus have refused to defend § 704(b). Of course, recognizing his role as Commander-in-Chief, and the harmful nature, to veterans, of lies about military medals, the President also might have continued to defend the statute (and indeed he did).

Yet suppose hypothetically that President Obama was concerned about § 704(b)’s constitutionality. Under my framework—even when applied outside of the equal protection context—the President would have made further inquiries that would have made him *less likely* to refuse to defend the statute. He would have asked about Congress’s actual contemporaneous rationality, and found that Congress both made formal findings<sup>235</sup> and debated the merits of the statute.<sup>236</sup> These very sources could have helped the President determine what Congress intended and whether the intent was consistent with First Amendment standards. The President could have brought his institutional capacities as Commander-in-Chief to bear on these questions and ask what effect the provision would have had on the military, much as Clinton did in the context of HIV-positive individuals.<sup>237</sup> And the President would have found no indicia of the *Carolene Products* problem—i.e., the tyranny of the majority over a minority, and especially not a minority with an immutable condition. Rather, he would have seen that

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<sup>231</sup> See *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010) (“Our [previous] decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”).

<sup>232</sup> *Playboy*, 529 U.S. at 818 (emphasis added).

<sup>233</sup> *Alvarez I*, 617 F.3d at 1216 (“Even the dissent agrees that the Act fails strict scrutiny.”).

<sup>234</sup> *United States v. Strandlof*, 667 F.3d 1146, 1153–54 (10th Cir. 2012) (upholding § 704(b) under so-called breathing space review), *abrogated by Alvarez III*, 132 S. Ct. 2537.

<sup>235</sup> Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266.

<sup>236</sup> See, e.g., 152 CONG. REC. 22,575 (2006) (statement of Rep. John Conyers, Jr.); *id.* at 22,575 (statement of Rep. John Kline); *id.* at 22,574–75 (statement of Rep. James Sensenbrenner); 151 CONG. REC. 12,688–89 (2005) (statement of Sen. Kent Conrad).

<sup>237</sup> See *supra* notes 60 & 165 and accompanying text.

Congress had documented that the government in fact had arguably compelling interests at least rationally related to § 704(b).<sup>238</sup>

The President would then have asked what the Court would do and would have sought to ensure that there was judicial review. Here, because of the stringent standards applied to content-based regulations in the First Amendment context, the President would have had reason to believe that the Court might in fact strike down § 704(b) without any need for him to suggest that it do so, even if, after the foregoing inquiry, he had come to the conclusion that the law ought to fall. And indeed, a plurality of the Court *did* strike down § 704(b), after noting that “[t]he Government has not demonstrated that false statements generally should constitute a new category of unprotected speech,” and that “[t]he lack of a causal link between the Government’s stated interest and the Act” shows that “the Act is not actually necessary to achieve the Government’s stated interest.”<sup>239</sup>

\* \* \*

In short, even a First Amendment issue, especially one of limited scope, does not necessarily raise the types of concerns discussed earlier in this Part—in particular, tyranny of the majority and the risk that the Court may apply too deferential a standard. My gloss on the nondefense decisionmaking framework helps to serve as a limiting principle for future nondefense decisions.

#### IV. APPLYING THE NEW MODEL TO PRESIDENT OBAMA’S NONDEFENSE OF DOMA

I now apply this model—albeit after the fact—to President Obama’s decision to instruct the Department of Justice not to defend the Defense of Marriage Act. Note that, while this application requires some consideration of the merits of heightened scrutiny for classifications based on sexual orientation, the two inquiries are not the same. Here, the discussion focuses on the decisionmaking process itself.<sup>240</sup>

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<sup>238</sup> *Strandlof*, 667 F.3d at 1168-69 (“[T]he government has an important—perhaps compelling—interest in preventing individuals from falsely claiming to have received military awards.”).

<sup>239</sup> *Alvarez III*, 132 S. Ct. at 2547-49 (plurality opinion).

<sup>240</sup> For arguments that sexual orientation should receive heightened scrutiny, see Superseding Brief for Appellant at 21-22, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2011) (Nos. 10-2204, 10-2207 & 10-2214); Defendants’ Memorandum of Law in Response to Plaintiffs’ Motion for Summary Judgment and Intervenor’s Motion to Dismiss at 8-27, *Pederson v. Office of Pers. Mgmt.*, 2012 WL 3113883 (D. Conn. July 31, 2012) (No. 10-1750) [hereinafter DOJ’s *Pederson* Brief]; Defendants’ Brief in Opposition to Motions to Dismiss at 3-18,

At this point, one might again reasonably ask what my five-step model adds to the Dellinger/Johnsen framework. My model demands an extensive inquiry into the merits of *both* positions—that the statute is constitutional or that it is unconstitutional. The actual contemporaneous rationality standard ensures as much, because it cuts both ways. But it is also slightly less deferential to Congress and the Judiciary than Dellinger’s model, which asks primarily how the Court would resolve the issue. Of course, we do not know what the Court will say about DOMA; the result could, but need not, turn on the difference between rational basis review and heightened scrutiny. But my modifications increase the likelihood that, in situations like the decision not to defend DOMA, the President will not merely cursorily state that the act is unconstitutional—as Clinton did when refusing to enforce the HIV provision<sup>241</sup>—but will instead provide substantial guidance to explain the decision to the public, as well as *influencing*, rather than merely *predicting*, the Court’s outcome.

This democratic demand for transparency is valuable. And, as the following discussion makes clear, in addition to the Holder Letter, the DOJ has provided extensive guidance to the Court and the public that explains why DOMA should be judged under heightened scrutiny and be found unconstitutional on that basis. Finally, my model suggests just how distinct equal protection violations are, and it suggests the importance of looking into and openly addressing the particular constitutional value at issue.

In this Part, I will show that President Obama’s decision not to defend DOMA comports with the five-step model proposed above. Obama assessed the suggested criteria and ultimately reached a decision where he is prepared to defer—in the final judgment—to the Judiciary. I first address Obama’s consideration of the Take Care Clause and repeal efforts. Then, I discuss how Obama and the DOJ evaluated the constitutionality of the statute and considered Congress’s actual contemporaneous rationality, changes in circumstances, whether the law had changed, and the magnitude of the ongoing harm. Finally, I explore how the DOJ has sought—and sought to influence—judicial review—thereby respecting the separation of powers.

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Golinski v. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012) (No. 10-0257) [hereinafter DOJ’s *Golinski* Brief]. For an appellate holding to this effect, see *infra* notes 353-59 and accompanying text.

<sup>241</sup> See Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 227, 227 (Feb. 10, 1996) (“I have concluded that this discriminatory provision is unconstitutional. Specifically, it violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose.”).

### A. *The Take Care Clause and Repeal Efforts*

President Obama has considered his role and responsibilities under the Take Care Clause. The Holder Letter acknowledges “the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality.”<sup>242</sup> First, Attorney General Holder clearly explains that the President has found a middle ground by instructing him to enforce, but not to defend, DOMA.<sup>243</sup> Second, President Obama also supports the Respect for Marriage Act, which would repeal DOMA,<sup>244</sup> and his instrumental efforts in the repeal of the military’s “don’t ask, don’t tell” policy show his support to be more than mere rhetoric.<sup>245</sup> President Obama is thus simultaneously pursuing both nondefense and repeal strategies, while recognizing the reality that, in today’s Senate, the filibuster means slim chances of repeal.<sup>246</sup>

### B. *Evaluating the Statute’s Constitutionality*

In this Section, I show that Obama’s considerations complied with my modified model. I first analyze whether Obama and the DOJ considered Congress’s actual contemporaneous rationality behind DOMA. Then, I address their consideration of changed circumstances and law, as well as the magnitude of the ongoing harm.

#### 1. Actual Contemporaneous Rationality

If the Holder Letter is any indication, President Obama took this criterion to its logical conclusion. Holder describes looking to DOMA’s legislative history and finding the House Report<sup>247</sup> rife with “moral

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<sup>242</sup> See Holder Letter, *supra* note 2.

<sup>243</sup> *Id.*

<sup>244</sup> See S. 598, 112th Cong. § 3 (2011) (defining an individual as married under federal law if the individual’s marriage is valid under the laws of any state); see also H.R. 1116, 112th Cong. § 3 (2011) (same); Colleen Curtis, *President Obama Supports the Respect for Marriage Act*, WHITE HOUSE BLOG (July 19, 2011, 6:43 PM), <http://www.whitehouse.gov/blog/2011/07/19/President-obama-supports-respect-marriage-act> (announcing President Obama’s support for the Respect for Marriage Act).

<sup>245</sup> See Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; Jesse Lee, *The President Signs Repeal of “Don’t Ask Don’t Tell”: “Out of Many, We Are One”*, WHITE HOUSE BLOG (Dec. 22, 2010, 12:35 PM), <http://www.whitehouse.gov/blog/2010/12/22/President-signs-repeal-dont-ask-dont-tell-out-many-we-are-one>.

<sup>246</sup> See OLESZEK, *supra* note 186, at 272 (discussing the need for sixty votes given the frequent use of the filibuster).

<sup>247</sup> H.R. REP. NO. 104-664 (1996) [hereinafter HOUSE REPORT].

disapproval of gays and lesbians and their intimate and family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.”<sup>248</sup>

Holder’s characterization could not be more accurate: brimming with the language of attack, assault, combat, war, and threats, the House Report literally casts gay men and lesbians as the enemy and leaves little doubt as to how the Act’s name was selected.<sup>249</sup> One of DOMA’s two stated purposes “is to *defend* the institution of traditional heterosexual marriage” because “[t]he prospect of permitting homosexual couples to ‘marry’ . . . *threatens* to have very real consequences.”<sup>250</sup> By its own admission, Congress was reacting to its incomprehension of *Romer v. Evans*,<sup>251</sup> decided just one month earlier, in which the Court held that a Colorado constitutional amendment (Amendment 2) prohibiting government action designed to protect homosexuals from discrimination violated the Equal Protection Clause (under the rational basis standard) since it “raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>252</sup> Congress seized on Justice Scalia’s rhetoric; he had declared that “[t]he Court ha[d] mistaken a Kulturkampf for a fit of spite.”<sup>253</sup> In the Report, Congress itself declared war against the “orchestrated legal assault being waged” as part of a campaign “on religious, cultural, and legal fronts” to secure gay marriage in the states.<sup>254</sup> The report cast DOMA as “a modest effort to *combat*” the threat of gay marriage and declared that the time had come “to take sides in this culture war.”<sup>255</sup> And as with every war, the doves—here, the bill’s detractors—argued that the hawks had no “factual basis” for declaring gay marriage a threat but had instead “use[d] ignorance as an excuse for haste” by failing to hold hearings to investigate the evidence.<sup>256</sup>

Against this backdrop, Obama and the DOJ asked whether the drafters of the House Report had considered DOMA’s constitutionality under the Fifth Amendment’s guarantee of equal protection. The answer they found was, only perfunctorily. Unabashedly unable to make sense of *Romer*, the

<sup>248</sup> Holder Letter, *supra* note 2.

<sup>249</sup> See *id.* n.7 (collecting examples).

<sup>250</sup> HOUSE REPORT, *supra* note 247, at 2 (emphasis added).

<sup>251</sup> See *id.* at 32 (“*Romer* is, to put it charitably, an elusive decision.”).

<sup>252</sup> *Romer v. Evans*, 517 U.S. 620, 634 (1996).

<sup>253</sup> *Id.* at 636 (Scalia, J., dissenting).

<sup>254</sup> HOUSE REPORT, *supra* note 247, at 2-3.

<sup>255</sup> *Id.* at 12 (emphasis added) (quoting *Romer*, 517 U.S. at 652 (Scalia, J., dissenting)).

<sup>256</sup> *Id.* at 42 (dissenting views) (“The notion that allowing two people who are in love to become legally responsible to and for each other threatens heterosexual marriage is without factual basis.”).

drafters had nonetheless lambasted the *Romer* Court for foregoing “even a cursory analysis of the interests Amendment 2 might serve.”<sup>257</sup> To Congress, sitting as a supercourt accusing the Supreme Court of sitting as a superlegislature, “it [was] inconceivable how Amendment 2 could fail to meet the rational basis test.”<sup>258</sup> “[N]othing, in the Court’s recent decision,” they concluded, “suggests that the Defense of Marriage Act is constitutionally suspect.”<sup>259</sup>

The drafters proceeded to present the four government interests that DOMA would advance<sup>260</sup> while eliding the notion that the legislative classifications must be rationally related to those interests.<sup>261</sup> What Holder must have seen in the legislative history—and what the drafters, ostensibly, did and could not—was that DOMA was “born of animosity.”<sup>262</sup> First, the drafters asserted, the government had an “interest in defending and nurturing the institution of traditional, heterosexual marriage” to promote procreation and child-rearing.<sup>263</sup> Holder dispelled this notion as “unreasonable” against the weight of “numerous studies,”<sup>264</sup> and he might also have cited *Perry v. Schwarzenegger*’s extensive findings of fact that children fare no better in straight rather than gay households.<sup>265</sup> Holder again stacked the weight of modern science<sup>266</sup> against the drafters’ claim that sexual orientation is mutable.<sup>267</sup>

Second, the drafters claimed that DOMA “advances the government’s interest in defending traditional notions of morality”—“traditional (especially Judeo-Christian) morality.”<sup>268</sup> Holder aptly addressed this contention, too, by declaring it “precisely the kind of stereotype-based thinking and

<sup>257</sup> HOUSE REPORT, *supra* note 247, at 32.

<sup>258</sup> *Id.* (internal quotation marks omitted). The drafters argued it was “inconceivable” because, in their eyes, Amendment 2 safeguarded “the freedom of association,” and “it is self-evident that protecting that freedom is a legitimate government purpose.” *Id.*

<sup>259</sup> *Id.* at 33.

<sup>260</sup> *Id.* at 12.

<sup>261</sup> *See id.* at 33 (“[T]he Defense of Marriage Act is also plainly constitutional under *Romer*. The Committee briefly described above at least four legitimate government interests that are advanced by this legislation—namely, defending the institution of traditional heterosexual marriage; defending traditional notions of morality; protecting state sovereignty and democratic self-governance; and preserving government resources. The Committee is satisfied that these interests amply justify the enactment of this bill.”).

<sup>262</sup> *See id.* at 32 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

<sup>263</sup> *Id.* at 12-13.

<sup>264</sup> Holder Letter, *supra* note 2.

<sup>265</sup> *See supra* note 84 and accompanying text.

<sup>266</sup> *See* Holder Letter, *supra* note 2 (explaining that claims that sexual orientation is mutable “can[not] be reconciled with more recent social science understandings” and citing studies).

<sup>267</sup> *See* HOUSE REPORT, *supra* note 247, at 15 n.53 (“Maintaining a preferred societal status of heterosexual marriage thus will also serve to encourage heterosexuality . . .”).

<sup>268</sup> *Id.* at 15-16.



animus the Equal Protection Clause is designed to guard against.”<sup>269</sup> Justice O’Connor’s concurrence in the judgment in *Lawrence v. Texas* provides additional support for Holder’s stance. She explained that “[m]oral disapproval . . . , like a bare desire to harm [a] group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”<sup>270</sup>

Third, the drafters asserted that DOMA “advances the government’s interest in protecting state sovereignty and democratic self-governance” by taking the matter away from the courts.<sup>271</sup> As a logical proposition, this rationale is no better than the one often advanced to support court-stripping. It is both tautological and orthogonal to the rational basis analysis. It asserts, “We have a legitimate interest in this law because we agreed to pass it by majority vote”—a factor wholly irrelevant to (and, indeed, often at odds with) constitutionality.

Fourth and finally, the drafters asserted that DOMA “advances the government’s interest in preserving scarce government resources.”<sup>272</sup> Even under the rational basis standard, however, the animus, moral disapproval, and prejudice behind DOMA are clear, so the inquiry becomes not whether saving money is a legitimate end, but whether the discriminatory classification Congress has chosen is a permissible means of tightening the fisc.<sup>273</sup> Finally, the drafters’ failure to respond to the dissenting views’ due

<sup>269</sup> Holder Letter, *supra* note 2.

<sup>270</sup> 539 U.S. 558, 582 (2003) (O’Connor, J., concurring in the judgment). For support, Justice O’Connor cited *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), in which the Court explained that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest” in striking down a law determined to be merely a vehicle to harm “hippies.” *Id.* at 534.

<sup>271</sup> HOUSE REPORT, *supra* note 247, at 16; see also *An Examination of the Constitutional Amendment on Marriage: Hearing Before the Subcomm. on the Constitution, Civil Rights & Property Rights of the Comm. on the Judiciary*, 109th Cong. 5 (2005) (statement of Professor Christopher Wolfe) (“[G]iven the existence of a well-organized and financed effort to legalize same-sex marriage in this country, backed by extensive ideological scholarship in the academy and in the legal community, it is only prudent to remove even the possibility that judges will intervene to strike down the Defense of Marriage Act and the State laws it was intended to protect.”).

<sup>272</sup> HOUSE REPORT, *supra* note 247, at 18.

<sup>273</sup> See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012) (“[W]here the distinction is drawn against a historically disadvantaged group and has no other basis [than saving the government money], Supreme Court precedent marks this as a reason undermining rather than bolstering the distinction.” (citing *Plyler v. Doe*, 457 U.S. 202, 227 (1982))); cf. *Saenz v. Roe*, 526 U.S. 489, 506 (1999) (“The question is not whether such saving is a legitimate purpose but whether the State may accomplish that end by the discriminatory means it has chosen.”).

process<sup>274</sup> and heightened scrutiny concerns<sup>275</sup> only reinforces the poverty of their actual contemporaneous constitutional assessment.<sup>276</sup>

## 2. Have Circumstances Changed?

As President, Obama has also been uniquely positioned to take stock of social indicators, many of which point to the conclusion that heightened scrutiny should apply to classifications based on sexual orientation. To begin, as the Holder Letter observes, sexual orientation is immutable;<sup>277</sup> there is a growing consensus on this point.<sup>278</sup> Immutability satisfies one criterion of the heightened scrutiny analysis.<sup>279</sup> Social indicators of prejudice satisfy another.<sup>280</sup> Far from supporting discrimination based on sexual orientation, polls show that popular opinion is shifting towards “seeing gay and lesbian relations as morally acceptable”; support for same-sex marriage “is near record highs.”<sup>281</sup> Overall, the last few years have revealed a compel-

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<sup>274</sup> See HOUSE REPORT, *supra* note 247, at 40 (dissenting views) (noting that the right to marry is constitutionally protected (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978))).

<sup>275</sup> See *id.* (“If an argument can be persuasive that the anti same sex marriage statute is discrimination based on gender, it may well receive intermediate scrutiny. . . . For strict scrutiny, the court would have to . . . elevate classifications based on homosexuality to that of strict scrutiny, a level which may be due . . . .” (emphasis added)).

<sup>276</sup> There are parallels in the DOJ’s argument that multiple lower courts have failed to adequately consider the argument for heightened scrutiny over rational basis in evaluating DOMA. See *infra* notes 353-372 and accompanying text.

<sup>277</sup> See Holder Letter, *supra* note 2.

<sup>278</sup> See RICHARD A. POSNER, SEX AND REASON 98-108 (1992) (discussing “the biology of ‘deviant’ sex”). As early as 1992, Judge Posner translated this consensus into legal terms: “[T]o discriminate . . . against persons on the basis of their sexual preference . . . is particularly suspect because sexual preference is a largely immutable characteristic and therefore analogous to sex and race, which under the jurisprudence of equal protection are—race especially—highly disfavored grounds of discrimination.” *Id.* at 348 (citations omitted); see also Barbara L. Frankowski, *Sexual Orientation and Adolescents*, 113 PEDIATRICS 1827, 1828 (2004) (“[T]he current literature and most scholars in the field state that one’s sexual orientation is not a choice; that is, individuals do not choose to be homosexual or heterosexual.”); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 161-65 (2011) (discussing shifting definitions of immutability and the disagreement among lower courts regarding whether sexual orientation is an immutable characteristic).

<sup>279</sup> For factors relevant to the Court’s determination of whether a classification should receive heightened scrutiny, see *Lyng v. Castillo*, 477 U.S. 635 (1986) and *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). See also *Lyng*, 477 U.S. at 638 (considering, “[a]s a historical matter,” whether a particular class has “been subjected to discrimination”; exhibits “obvious, immutable, or distinguishing characteristics that define [it] as a discrete group”; and is “a minority or politically powerless.”); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 504 (1998) (“[T]reating people differently because of traits they cannot change violates fundamental norms of fairness and equality.”).

<sup>280</sup> See *supra* note 279.

<sup>281</sup> See Lydia Saad, *Americans’ Acceptance of Gay Relations Crosses 50% Threshold*, GALLUP (May 25, 2010), <http://www.gallup.com/poll/135764/Americans-Acceptance-Gay-Relations-Crosses->

ling trend toward societal acceptance of gays and lesbians.<sup>282</sup> Moreover, as much as Justice Scalia would claim that these changing social “mores” prove that the lesbian and gay community is “a politically powerful minority”<sup>283</sup> that has gotten the Court to “sign[] on to [its] so-called homosexual agenda,”<sup>284</sup> as Holder points out, (1) discrimination in the military and employment demonstrate the political-legal reality for sexual-orientation minorities, and (2) political powerlessness is not a prerequisite to the application of heightened scrutiny, as the extension of heightened scrutiny to sex-based classifications illustrates.<sup>285</sup>

In fact, the taint of sexual orientation discrimination affects lesbian- and gay-identified individuals in all sectors of our society, even if one leaves the issue of widespread marriage inequality to one side.<sup>286</sup> Bigotry born in schools<sup>287</sup>—where a full 90% of lesbian, gay, bisexual, and/or transgender-identified youth experience bullying or harassment, more than half feel unsafe,<sup>288</sup> and some respond with suicide,<sup>289</sup>—spreads to places of

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Threshold.aspx; see also, e.g., Kate Zernike, *Conservatives' Focus on Fiscal Matters Means Few Care About a Gay Republican*, N.Y. TIMES, Aug. 27, 2010, at A9 (“In a New York Times/CBS News poll conducted in March 2004, a plurality of Americans under 45—35 percent—said there should be no legal recognition of gay and lesbian relationships. Forty-five percent of Americans 45 and older said the same. By April 2010, just 24 percent of Americans ages 18 to 44 surveyed said that there should be no legal recognition, and 35 percent of Americans 45 and older said the same.”).

<sup>282</sup> See, e.g., Charles M. Blow, *Gay? Whatever, Dude*, N.Y. TIMES, June 5, 2010, at A21 (describing society’s increasingly accepting views of gays and lesbians).

<sup>283</sup> *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

<sup>284</sup> *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

<sup>285</sup> Holder Letter, *supra* note 2 (“[W]hen the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).”).

<sup>286</sup> Twenty-nine states constitutionally define marriage as a union between a man and a woman, and twelve bar the state from recognizing same-sex marriage. See John Schwartz, *After New York, New Look at Defense of Marriage Act*, N.Y. TIMES, June 28, 2011, at A12.

<sup>287</sup> In 2008–2009, for instance, the New York public school system reported nearly 900 incidents of harassment based on sexual orientation. Al Baker, *Bratton's Law-and-Order Appeal for Same-Sex Marriage*, N.Y. TIMES (Mar. 31, 2011, 6:29 PM), <http://cityroom.blogs.nytimes.com/2011/03/31/brattons-law-and-order-appeal-for-same-sex-marriage>.

<sup>288</sup> JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 25–29 (2010) (surveying all types of harassment, from cyberbullying to physical assault). See generally STUART BIEGEL & SHEILA JAMES KUEHL, THE WILLIAMS INSTITUTE, SAFE AT SCHOOL: ADDRESSING THE SCHOOL ENVIRONMENT AND LGBT SAFETY THROUGH POLICY AND LEGISLATION (2010), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Biegel-Kuehl-Safe-At-School-Oct-2011.pdf> (making similar findings, and proposing model legislation).

<sup>289</sup> See, e.g., 157 CONG. REC. S1557 (daily ed. Mar. 10, 2011) (statement of Sen. Franken) (“Justin was a kind young man, friendly and cheerful, a budding composer, but he was also the target for bullies at his high school, who targeted him because he was different—because he was

employment<sup>290</sup> and the private housing market.<sup>291</sup> In addition, same-sex spouses are frequently denied visiting rights at hospitals<sup>292</sup> and face further unequal treatment under the law with respect to jointly held property,<sup>293</sup> estate<sup>294</sup> and income tax,<sup>295</sup> entitlements and military benefits,<sup>296</sup> and immigration.<sup>297</sup>

Holder succinctly and effectively disputed that gay men and women are a politically powerful group.<sup>298</sup> He could have elaborated, however, for viewing gay men and women as a politically powerful minority conflates effort with outcome. While they have filed a number of lawsuits,<sup>299</sup> they had

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gay. . . . His family lost him to suicide last summer. . . . [U]nfortunately, there are a lot of other kids out there struggling to get through school as they suffer from bullying and harassment and discrimination at their public schools. . . . This harassment deprives them of an equal education.”).

<sup>290</sup> For examples of a host of lawsuits brought alleging sexual orientation discrimination in employment, see 2 L. CAMILLE HÉBERT, *EMPLOYEE PRIVACY LAW* § 9:12 & n.3 (2012) .

<sup>291</sup> See Press Release, John Kerry—U.S. Senator for Massachusetts: Press Room, Kerry Legislation Would Outlaw LGBT Discrimination in Housing, Credit (Sept. 22, 2011), *available at* <http://kerry.senate.gov/press/release/?id=751ff93c-d922-4f6b-887e-90920819fc13> (“Still today, prejudiced landlords are discriminating against LGBT and other innocent tenants—and these tenants often have no recourse in states without LGBT protections.”).

<sup>292</sup> See Tara Parker-Pope, *In Sickness and in Health, Regardless of Gender*, N.Y. TIMES, Apr. 20, 2010, at D5 (noting the frequency of same-sex partners denied full visitation rights to see a partner or adopted child).

<sup>293</sup> See, e.g., Scott James, *An Unlikely Plaintiff. At Issue? He Dares Not Speak Its Name.*, N.Y. TIMES, May 7, 2010, at A19A (recounting the plight of a plaintiff who lost his partner and was unable to hold on to their cats and shared belongings).

<sup>294</sup> See John Schwartz, *Gay Couples Begin Attack on U.S. Marriage Law*, N.Y. TIMES, Nov. 9, 2010, at A20 (discussing how special rules for estate taxes apply to same-sex couples).

<sup>295</sup> See, e.g., *Answers to Frequently Asked Questions for Same-Sex Couples*, IRS (Aug. 4, 2012), <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Couples> (“Same-sex partners may not file using a married filing separately or jointly filing status because federal law does not treat same-sex partners as married for federal tax purposes.”).

<sup>296</sup> E.g., Katharine Q. Seelye, *Marriage Law Is Challenged as Equaling Discrimination*, N.Y. TIMES, May 7, 2010, at A16 (describing how a longtime postal worker challenged the Defense of Marriage Act as unconstitutional because he was not afforded the same health benefits for his spouse as were his married heterosexual co-workers).

<sup>297</sup> See Associated Press, *National Briefing: New England; Massachusetts: Husbands Reunited*, N.Y. TIMES, June 5, 2010, at A14 (describing how a Brazilian man needed the assistance of Senator John Kerry to gain admittance to the country in his effort to reunite with his husband).

<sup>298</sup> See Holder Letter, *supra* note 2 (“[T]he adoption of laws like those at issue in *Romer v. Evans* and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power . . .”).

<sup>299</sup> E.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (considering a challenge to California’s Proposition 8), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1062 (9th Cir. 2012); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (considering a challenge to DOMA), *aff’d sub nom. Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

received few favorable appellate holdings;<sup>300</sup> the Ninth Circuit's narrow ruling in *Perry v. Brown* was handed down on February 7, 2012, nearly a year after Holder issued his letter,<sup>301</sup> and only recently did the Second Circuit strike DOMA down under heightened scrutiny.<sup>302</sup> For instance, even a cursory survey of Title VII suits alleging employment discrimination on the basis of sexual orientation reveals the breadth and depth of societal animosity towards gay men and women.<sup>303</sup>

The bottom line is that "Congress has not yet seen fit . . . to provide protection against such harassment."<sup>304</sup> While the Employment Non-Discrimination Act, which would allow disparate treatment and retaliation claims for discrimination on the basis of sexual orientation,<sup>305</sup> passed the House in 2007<sup>306</sup> and met with President Obama's support,<sup>307</sup> the bill

<sup>300</sup> *E.g.*, *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009) ("[T]he application of DOMA . . . so as to deny Levenson's request that his same-sex spouse receive federal benefits violates the Due Process Clause of the Fifth Amendment.").

<sup>301</sup> *See* 671 F.3d at 1096 (holding that California's Proposition 8 violated the Equal Protection Clause).

<sup>302</sup> *See Windsor v. United States*, Nos. 12-2335 & 12-2435, 2012 WL 4937310, at \*10-13 (2d Cir. Oct. 18, 2012).

<sup>303</sup> *See, e.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 760 (6th Cir. 2006). Plaintiff Vickers allegedly left his job because coworkers terrorized him for openly associating with a gay doctor: in addition to placing chemicals in his food and on his property, "Vickers' co-workers repeatedly touched his crotch with a tape measure, grabbed Vickers' chest while making derogatory comments, tried to shove a sanitary napkin in Vickers' face, and simulated sex with a stuffed animal and then tried to push the stuffed animal into Vickers' crotch." *Id.* at 760. Despite these vivid accusations, the Sixth Circuit affirmed the district court's dismissal of the suit. It held that Title VII of the Civil Rights Act of 1964 does not "encompass sexual orientation as a prohibited basis for discrimination." *Id.* at 764.

Other circuits agree that Congress has provided no statutory remedy, despite consensus that harassment on the basis of sexual orientation is intolerable. *E.g.*, *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (declaring such harassment "morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace," but finding for the defendant); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (describing harassment on the basis of sexual orientation as "a noxious practice, deserving of censure and opprobrium," but finding for the defendant). Moreover, some courts have even flirted with *disqualifying* plaintiffs who otherwise have valid Title VII sex-stereotyping cases, simply because they were gay. *See, e.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 219 (2d Cir. 2005) ("[A] gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII." (quoting *Simonton*, 232 F.3d at 38) (internal citations omitted)). Only in *Provel v. Wise Business Forms, Inc.* did an appellate court expressly hold otherwise. *See* 579 F.3d 285, 292 (3d Cir. 2009) ("There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not."); *see also* HÉBERT, *supra* note 290, § 9:12 & n.3 (collecting cases).

<sup>304</sup> *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001).

<sup>305</sup> S. 811, 112th Cong. §§ 4-5 (2011); *see also* H.R. 1397, 112th Cong. §§ 4-5 (2011).

<sup>306</sup> David M. Herszenhorn, *House Backs Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007, at A1.

languishes yet again in committee.<sup>308</sup> Whatever animates congressional opposition to same-sex marriage, it is hard to fathom why members of Congress withhold support from bills that narrowly aim to address animosity toward gay men and women. Surely, Obama must have made the “inevitable inference” that congressional inaction “is born of animosity toward the class of persons affected.”<sup>309</sup>

Just as importantly, President Obama must have taken stock of the support he could count on following his nondefense decision. Before the Holder Letter, lawsuits,<sup>310</sup> high-profile figures’ coming out,<sup>311</sup> and political heavyweights speaking up during New York’s push for marriage equality<sup>312</sup> all lent support to Obama’s decision. To further bolster his stance, Obama could have publicly pointed to Washington, D.C.’s becoming, in 2010, the sixth jurisdiction in the United States to allow same-sex marriage.<sup>313</sup> In addition, a prominent law firm, King & Spalding, withdrew from representing Congress in its defense of DOMA.<sup>314</sup> Holder summarized the change in momentum: “[T]here is a growing acknowledgement that sexual orientation ‘bears no relation to ability to perform or contribute to society.’”<sup>315</sup>

### 3. Has the Law Changed?

President Obama’s inquiry responded to shifts in the courts in the years between the passage of DOMA and his nondefense decision. Before Congress voted on DOMA, one of President Clinton’s Assistant Attorneys

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<sup>307</sup> See *Civil Rights*, WHITE HOUSE, <http://www.whitehouse.gov/issues/civil-rights> (last visited Oct. 11, 2012).

<sup>308</sup> See *Thomas*, LIBR. OF CONGRESS, <http://thomas.loc.gov/home/thomas.php> (click “bill number”; enter “S. 811” in textbox; click “search” hyperlink) (last visited Oct. 11, 2012).

<sup>309</sup> *Romer v. Evans*, 517 U.S. 620, 634 (1996).

<sup>310</sup> See, e.g., *supra* note 290.

<sup>311</sup> E.g., Michael Luo, *Former Republican Leader Discloses That He Is Gay*, N.Y. TIMES, Aug. 26, 2010, at A16 (reporting that President George W. Bush’s former campaign manager revealed that he is gay).

<sup>312</sup> See Michael Barbaro, *New Ads to Try to Build Public Support for Gay Marriage*, N.Y. TIMES, Sept. 14, 2010, at A22 (describing videos with celebrities such as Julianne Moore, Kyra Sedgwick, Michael Bloomberg, and the Rev. Al Sharpton). Former President George W. Bush’s daughter also made one such video. See Michael Barbaro, *Daughter of Bush Endorses Gay Marriage*, N.Y. TIMES, Feb. 1, 2011, at A14.

<sup>313</sup> Ian Urbina, *Nation’s Capital Joins 5 States in Legalizing Same-Sex Marriage*, N.Y. TIMES, Mar. 4, 2010, at A20.

<sup>314</sup> Victor Li, *King & Spalding Quits DOMA Case, Paul Clement Quits King & Spalding*, AMLAW DAILY (Apr. 25, 2011, 3:26 PM), <http://amlawdaily.typepad.com/amlawdaily/2011/04/domakandsclement.html> (“The move comes after King & Spalding faced severe backlash and criticism over its decision to represent the U.S. House.”).

<sup>315</sup> See Holder Letter, *supra* note 2 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)).

General asserted rather flatly that the DOJ believed DOMA “would be sustained as constitutional” since it presented “no legal issues.”<sup>316</sup> But by the time President Obama made the decision to stop defending DOMA, at least two federal courts had found it unconstitutional. In *Gill v. Office of Personnel Management*, a federal district court in Massachusetts held that, “even under the highly deferential rational basis test,” DOMA is unconstitutional.<sup>317</sup> The *Gill* court dismissed all four objectives Congress asserted in the House Report,<sup>318</sup> and the First Circuit has since affirmed the district court’s judgment (although only under rational basis review).<sup>319</sup> And in the Ninth Circuit, Judge Reinhardt had earlier determined that DOMA’s restriction of federal benefits the plaintiff would otherwise have been entitled to under the Federal Employee Health Benefits Act was unconstitutional under the rational basis standard, even though he “believe[d] it likely that some form of heightened constitutional scrutiny applies.”<sup>320</sup> Just days before Holder sent his letter, at least one other court seemed to be moving in the same direction.<sup>321</sup>

In addition, President Obama must have reasonably believed that the Supreme Court will likely be at least somewhat receptive to Holder’s nondefense argument. The Court’s 2003 decision in *Lawrence v. Texas* struck down a Texas sodomy law criminalizing intimate same-sex conduct as violative of the liberty that the Due Process Clause of the Fourteenth Amendment safeguards.<sup>322</sup> In her concurrence in the judgment, Justice O’Connor wrote that she would have relied instead on the Equal Protection

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<sup>316</sup> HOUSE REPORT, *supra* note 247, at 34 (letter of Assistant Attorney General Andrew Fois).

<sup>317</sup> 699 F. Supp. 2d 374, 387 (D. Mass. 2010), *aff’d sub nom.* Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012). In the companion case to *Gill*, the same court struck down DOMA as a violation of the Spending Clause, reasoning that “DOMA induces the Commonwealth to violate the equal protection rights of its citizens” by “impos[ing] an unconstitutional condition [the denial of marriage-based benefits to same-sex couples] on the receipt of federal funding.” Massachusetts v. U.S. Dep’t of Health & Human Servs., 698 F. Supp. 2d 234, 248-49 (D. Mass. 2010), *aff’d*, 682 F.3d 1.

<sup>318</sup> See *Gill*, 699 F. Supp. 2d at 388-90.

<sup>319</sup> See *Massachusetts*, 682 F.3d at 16 (“Under current Supreme Court authority, Congress’ denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest.”).

<sup>320</sup> *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009).

<sup>321</sup> See *Dragovich v. U.S. Dep’t of the Treasury*, 764 F. Supp. 2d 1178, 1188-92 (N.D. Cal. 2011) (holding that the plaintiffs had made out cognizable equal protection and substantive due process claims).

<sup>322</sup> See 539 U.S. 558, 578 (2003) (O’Connor, J., concurring in the judgment) (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).

Clause, albeit under the rational basis standard.<sup>323</sup> One need not extrapolate far from Justice O'Connor's observation that "Texas' sodomy law brands all homosexuals as criminals" and "subjects [them] to 'a lifelong penalty and stigma,'"<sup>324</sup> to conclude that sexual orientation should receive heightened scrutiny. If *Romer* was the starting point, then *Lawrence*, especially in Justice O'Connor's concurrence, points toward the Court's eventually agreeing with President Obama's analysis—especially if his DOJ exerts its influence.

#### 4. Magnitude of the Ongoing Harm

President Obama almost certainly considered the magnitude of the ongoing harm caused by DOMA. As the Solicitor General, Donald Verrilli, Jr., has asserted in his petition for Supreme Court review, "Authoritative resolution of the question presented is of great importance to the United States and to respondents and tens of thousands of others who are being denied the equal enjoyment of the benefits that federal law makes available to persons who are legally married under state law."<sup>325</sup> President Obama's actions—actions that only he, as President, could take<sup>326</sup>—bespeak his recognition of this ongoing harm. For example, after one woman suffered a fatal aneurysm,<sup>327</sup> Obama directed the Department of Health and Human Services to promulgate regulations requiring covered hospitals to allow same-sex partners to visit their partners and serve as healthcare proxies.<sup>328</sup> Obama also extended benefits to same-sex partners of federal employees in mid-2009<sup>329</sup> and directed the Department of Labor to allow gay federal employees to take family and medical leave to care for same-sex partners and the children of those partners.<sup>330</sup> These solutions demonstrate his grasp of the underlying harms DOMA creates, as well as his use of his institutional competence in beginning to address them.

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<sup>323</sup> *Id.* at 580. Justice O'Connor further explained that "moral disapproval" was not a legitimate basis for discriminating against a class of individuals. *Id.* at 582.

<sup>324</sup> *Id.* at 581, 584 (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

<sup>325</sup> Solicitor General's *Massachusetts* Certiorari Petition, *supra* note 132, at 13.

<sup>326</sup> *See supra* subsection III.A.2.

<sup>327</sup> Kevin Sack, *In Hospital Decision, Obama Finds Safe Ground on Gay Rights*, N.Y. TIMES, Apr. 17, 2010, at A9.

<sup>328</sup> The regulations cover hospitals participating in Medicare and Medicaid programs. Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, 75 Fed. Reg. 20,511 (Apr. 20, 2010).

<sup>329</sup> Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29,393 (June 22, 2009).

<sup>330</sup> Robert Pear, *Gay Workers Will Get Time to Care for Partner's Sick Child*, N.Y. TIMES, June 22, 2010, at A13.



In sum, in making his nondefense decision, President Obama appropriately evaluated (1) Congress's actual contemporaneous rationality (what Congress actually reasoned at the time of enactment), (2) whether circumstances or (3) the law had changed, and (4) the magnitude of the ongoing harm.

*C. What Would the Court Do? President Obama  
Seeks Judicial Resolution*

Since the Court has not yet decided what level of scrutiny classifications based on sexual orientation should receive,<sup>331</sup> President Obama has room to present his own constitutional views and seek judicial resolution as to their merit. The Holder Letter reads like a hybrid of a statement of policy and a legal brief, and for at least two courts, it has already proven to be the missing piece of the puzzle to its constitutional holding.<sup>332</sup> With this advisory opinion, Obama has handed the courts an interpretive tool and asked for a constitutional fix.

Furthermore, the DOJ has continued to seek judicial resolution of the issue. In its brief in *Pederson v. Office of Personnel Management*, the DOJ explained:

Section 3 of DOMA unconstitutionally discriminates. Section 3 treats same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under well-established factors set forth by the Supreme Court to guide the determination whether heightened scrutiny applies to a classification that singles out a particular group, discrimination based on sexual orientation merits heightened scrutiny. Under this standard of review, Section 3 of DOMA is unconstitutional.<sup>333</sup>

Then, applying Supreme Court precedent, the DOJ set forth a comprehensive argument for why classifications based on sexual orientation should receive heightened scrutiny.<sup>334</sup> Noting the *Romer*-based arguments discussed earlier, the brief then applied heightened scrutiny to DOMA and argued

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<sup>331</sup> See Holder Letter, *supra* note 2.

<sup>332</sup> See *In re Balas*, 449 B.R. 567, 574-76 (Bankr. C.D. Cal. 2011) (adopting the Holder Letter's analysis as "sound and consistent with the legislative history of DOMA" and quoting the letter extensively); *In re Somers*, 448 B.R. 677, 682 (Bankr. S.D.N.Y. 2011) (refusing to apply DOMA as "cause" for dismissing same-sex couple's bankruptcy case and finding the Holder Letter "relevant").

<sup>333</sup> DOJ's *Pederson* Brief, *supra* note 240, at 1.

<sup>334</sup> *Id.* at 8-27.

that the statute failed to pass muster.<sup>335</sup> The *Pederson* court agreed. Although it decided to apply rational basis review because “the Supreme Court has declined to afford [homosexuals] such [suspect] status,” the court nonetheless concluded, after a lengthy discussion tracking the DOJ’s argument, that “homosexuals warrant judicial recognition as a suspect classification.”<sup>336</sup> The DOJ’s approach has been consistent in other district courts, as well.<sup>337</sup>

The DOJ has also advanced its position in the courts of appeals. After Holder sent his letter, the DOJ called it to the First Circuit’s attention in *Massachusetts v. U.S. Department of Health & Human Services*.<sup>338</sup> The DOJ properly asserted that it could still appeal, despite agreeing with the plaintiffs that DOMA is unconstitutional.<sup>339</sup> Weeks later, the DOJ extensively briefed its argument that classifications based on sexual orientation should receive heightened scrutiny, under which DOMA, it asserted, is unconstitutional.<sup>340</sup>

Indeed, in both district court litigation and appellate review, the DOJ has considered its positions carefully to ensure judicial review of the equal protection issue at the level of heightened scrutiny. For instance, while it urged the First Circuit in *Massachusetts* to apply heightened scrutiny and strike down DOMA,<sup>341</sup> it also “opposed the separate Spending Clause and

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<sup>335</sup> *Id.* at 27-34; *see also id.* at 34 (“In sum, the official legislative record makes plain that DOMA Section 3 was motivated in substantial part by animus toward gay and lesbian individuals and their intimate relationships, and Congress identified no other interest that is materially advanced by Section 3. Section 3 of DOMA is therefore unconstitutional.”).

<sup>336</sup> *Pederson v. Office of Pers. Mgmt.*, No. 10-1750, 2012 WL 3113883, at \*16-35, \*35 (D. Conn. July 31, 2012).

<sup>337</sup> *See, e.g.*, DOJ’s *Golinski* Brief, *supra* note 240, at 3-18 (explaining why applying rational basis to classifications based on sexual orientation is flawed and why the court should apply heightened scrutiny).

<sup>338</sup> *See* Letter from Tony West, Ass’t Att’y Gen., U.S. Dep’t of Justice, to Margaret Carter, Clerk, U.S. Court of Appeals for the First Circuit at 1, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207 & 10-2214). The decision in *Massachusetts* resulted from the First Circuit’s consolidation of *Massachusetts v. U.S. Department of Health & Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010), with *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010).

<sup>339</sup> *See* Joint Proposal Regarding Further Proceedings at 3-4, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207 & 10-2214); *see also supra* note 224.

<sup>340</sup> *See* Superseding Brief for the United States Department of Health and Human Services at 21-22, *Massachusetts*, 682 F.3d 1 (Nos. 10-2207 & 10-2214) [hereinafter DOJ’s *Massachusetts* Brief] (“Under the well-established factors set forth by the Supreme Court to guide the determination whether heightened scrutiny applies to a classification that singles out a particular group, discrimination based of sexual orientation merits heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.”).

<sup>341</sup> *Id.*

Tenth Amendment claims pressed by the Commonwealth” of Massachusetts.<sup>342</sup> By defending on these alternative grounds, the DOJ has sent the unmistakable message that it wants the case decided on equal protection grounds.

The DOJ has also sought to persuade courts to hold clearly and explicitly that heightened scrutiny must be applied to DOMA. The risk of narrow holdings avoiding any ruling about the applicability of heightened scrutiny, and thus a prolonged period of legal uncertainty, is quite real. Not only did the First Circuit ultimately hold that “DOMA fails under the so-called rational basis test, traditionally used in cases not involving ‘suspect’ classifications,”<sup>343</sup> the Ninth Circuit also rested its holding, in California’s same-sex marriage cases, on the narrowest possible equal protection grounds.<sup>344</sup>

For this reason, the DOJ’s decision not to offer any rational basis arguments at all is tactically defensible.<sup>345</sup> For instance, in a brief in *Pederson*, the DOJ dispensed with any rational basis argument by pointing out simply that “[a]lthough there is substantial authority in other circuits holding that rational basis review generally applies to sexual orientation classifications, most of those decisions fail to give adequate consideration to these enumerated factors [for deciding whether to apply heightened scrutiny].”<sup>346</sup> The Holder Letter had stated not that the DOJ will *argue* the rational basis position, but rather that, if told by the court that “the applicable standard is rational basis,” the DOJ “will *state* that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3’s constitutionality *may be proffered* under that permissive standard.”<sup>347</sup> Consistent with this stance, the DOJ’s arguments have proceeded to note summarily and tangentially (e.g., in footnotes) that “if this Court holds that rational basis is the appropriate standard, . . . a reasonable argument for the constitutionality of Section 3 *can be made* under that permissive standard.”<sup>348</sup> Even after the district court in *Gill* struck down DOMA because it “fails to pass constitutional muster even under the highly deferential rational basis

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<sup>342</sup> *Massachusetts*, 682 F.3d at 7.

<sup>343</sup> *Id.* at 8.

<sup>344</sup> See *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (holding that Proposition 8’s infirmity was just like that of Amendment 2 in *Romer v. Evans*, 517 U.S. 620 (1996), since it targeted a minority group for the withdrawal of a right previously granted).

<sup>345</sup> See *supra* note 223.

<sup>346</sup> DOJ’s *Pederson* Brief, *supra* note 240, at 10-11 (footnote omitted).

<sup>347</sup> Holder Letter, *supra* note 2 (emphasis added); see also *supra* note 223 and accompanying text.

<sup>348</sup> DOJ’s *Golinski* Brief, *supra* note 240, at 18 n.14 (emphasis added).

test,”<sup>349</sup> the DOJ refused to view DOMA at this level of scrutiny. In its principal brief on appeal to the First Circuit, it offered no defenses of DOMA under rational basis, but instead argued that the circuit’s “precedent applying rational basis review to classifications based on sexual orientation should be reconsidered.”<sup>350</sup> Although the plaintiff had prevailed below, a rational basis holding was not enough for the DOJ, which argued instead that “the district court’s judgments should be affirmed on the ground that Section 3 of DOMA is subject to heightened scrutiny.”<sup>351</sup> A lingering footnote still intoned that “a reasonable argument . . . *can be made* under” rational basis,<sup>352</sup> but it has become increasingly clear that none will be found in the DOJ’s briefs.

The DOJ took a step further in its brief to the Second Circuit in *Windsor v. United States*.<sup>353</sup> It admitted that “[n]early all other courts of appeals have applied rational basis review to classifications based on sexual orientation” because those courts had failed adequately to “consider the factors the Supreme Court has identified to guide the determination of whether heightened scrutiny should apply.”<sup>354</sup> Thus, the DOJ asserted, the Second Circuit should “decline to adopt the reasoning of these out-of-circuit decisions, and instead undertake a complete analysis of the appropriate level of scrutiny applicable to classifications based on sexual orientation.”<sup>355</sup> Its advocacy seems to have worked<sup>356</sup>: Unlike the First Circuit in *Massachusetts*, the Second Circuit agreed that “no permutation of rational basis review is needed,” because “heightened scrutiny is available.”<sup>357</sup> As the DOJ had suggested, the court examined the “factors” that the Supreme Court uses “to decide whether a new classification qualifies as a quasi-suspect class,”<sup>358</sup> and concluded that “review of Section 3 of DOMA requires heightened

<sup>349</sup> Gill v. Office of Pers. Mgmt, 699 F. Supp. 2d 374, 387 (D. Mass. 2010).

<sup>350</sup> DOJ’s *Massachusetts* Brief, *supra* note 340, at 23.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 46 n.20.

<sup>353</sup> Nos. 12-2335 & 12-2435, 2012 WL 4937310 (2d Cir. Oct. 18, 2012).

<sup>354</sup> Brief for the United States at 33, *Windsor*, 2012 WL 4937310 (Nos. 12-2335 & 12-2435).

<sup>355</sup> *Id.*

<sup>356</sup> Indeed, it is telling that Judge Straub’s partial dissent explicitly took notice of DOJ’s advocacy in nondefense. See *Windsor*, 2012 WL 4937310, at \*15 (Straub, J., dissenting in part and concurring in part) (“[T]he Attorney General’s current position . . . is recently minted, and is . . . unprecedented in its departure from the Department of Justice’s long-standing policy of defending federal statutes even if the President disagrees as a matter of policy.”).

<sup>357</sup> *Windsor*, 2012 WL 4937310, at \*6 (majority opinion).

<sup>358</sup> *Id.*; see also *id.* (listing these factors as a history of discrimination, relation of the class characteristic to ability, discernibility of the characteristic (immutability), and political power (citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987))). For the application of these factors to the President’s nondefense decision, see *supra* note 220 and accompanying text.

scrutiny”<sup>359</sup> because “homosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.”<sup>360</sup> The court held that DOMA failed to meet this standard.<sup>361</sup>

Finally, Solicitor General Verrilli has not only sought review of DOMA—“so that the question may be authoritatively decided by th[e] Court,”<sup>362</sup> since the Judiciary is the final arbiter of Section 3’s constitutionality—but he has also done so strategically. Petitioning for certiorari in *Massachusetts v. U.S. Department of Health & Human Services*, Verrilli notified the Court that, in order to “ensure that [it] will have an appropriate vehicle in which to resolve the issues presented in a timely and definitive fashion, the government is also filing [simultaneously] a petition for a writ of certiorari before judgment in *Golinski*.”<sup>363</sup> Despite the rarity of petitioning for certiorari before judgment, Verrilli, in September 2012, also sought review of the decision of the district court in *Windsor*, before the Second Circuit ruled just over a month later, so that if neither *Massachusetts* nor *Golinski* “provide[d] an appropriate vehicle,” another case would be available.<sup>364</sup> Given the ostensible concern as this Comment goes to press that Justice Kagan may have to recuse herself from consideration of *Massachusetts* due to her former role as Solicitor General,<sup>365</sup> these decisions make good tactical sense. After the Second Circuit’s heightened-scrutiny decision in *Windsor*, Verrilli renewed the petition with a supplemental brief asking the Court to take *Windsor* over *Massachusetts* or *Golinski* because the Court is “no longer . . . faced with the decision whether to grant certiorari before judgment.”<sup>366</sup> And perhaps more importantly, unlike the *Massachusetts* court, the *Windsor* court could offer analysis more “beneficial to th[e] Court’s consideration,” as it was unbound by circuit precedent establishing “the applicable level of scrutiny.”<sup>367</sup>

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<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at \*9.

<sup>361</sup> *Id.* at \*10-13.

<sup>362</sup> Solicitor General’s *Massachusetts* Certiorari Petition, *supra* note 132, at 12.

<sup>363</sup> *Id.* at 23.

<sup>364</sup> Petition for a Writ of Certiorari Before Judgment at 10, *United States v. Windsor*, No. 12-307 (U.S. Sept. 11, 2012), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-307-Petition.pdf>.

<sup>365</sup> See Lyle Denniston, *Kagan, DOMA, and Recusal*, SCOTUSBLOG (Nov. 2, 2012, 4:59 PM), <http://www.scotusblog.com/2012/11/kagan-doma-and-recusal>.

<sup>366</sup> Supplemental Brief for the United States at 7, *United States v. Windsor*, No. 12-307 (U.S. Oct. 26, 2012), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/11/12-307-Supplement-to-Petition.pdf>.

<sup>367</sup> *Id.* at 10.

All in all, the most important point is that President Obama and the DOJ have sought to influence courts' decisions by persuading them to apply heightened scrutiny to their review of DOMA. Consistent with the Holder Letter, the Solicitor General maintains that "Section 3 of DOMA fails under heightened scrutiny" because it "does not substantially advance any important governmental purpose that motivated" its enactment.<sup>368</sup> Further, Solicitor General Verrilli's petitions for certiorari carefully explain to the Court why rational basis review is the incorrect standard to apply. Noting the moral disapproval and animosity that motivated the statute—the desire "not to further a proper legislative end but to make [gays] unequal to everyone else"<sup>369</sup>—Verrilli explained that the "First Circuit, like every other court of appeals that has addressed the issue to date," had failed to provide "an explanation" for its conclusion that rational basis should apply to "classifications based on sexual orientation."<sup>370</sup> Indeed, he continued, "[s]ubsequent decisions of this Court have undermined" the reasoning of the appellate courts that rational basis should apply to classifications based on sexual orientation.<sup>371</sup> With such advocacy, the Solicitor General, like the DOJ, has gone past prediction to influence. At the same time, however, the President's litigators have continued to respect the separation of powers by consistently supporting congressional intervention in the litigation.<sup>372</sup>

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As I suggest in my modifications to Dellinger's model, Presidents deciding whether to defend statutes that strike them as unconstitutional under equal protection doctrine should consider not only descriptively what the Court *might* do, but also normatively what it *should* do. Indeed, Obama and the DOJ have sought to influence judicial decisions by persuading courts to apply heightened scrutiny to their review of DOMA. And a year after his DOMA letter, Holder sent Speaker Boehner another letter to inform

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<sup>368</sup> *Id.* at 17.

<sup>369</sup> *Id.* at 18 (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)) (internal quotation marks omitted).

<sup>370</sup> *Id.* at 18-19.

<sup>371</sup> *Id.* at 20.

<sup>372</sup> In seeking Supreme Court review of DOMA, the Solicitor General explained that, although the DOJ "declined to defend" DOMA, it "did not oppose the subsequent intervention by [the Bipartisan Legal Advisory Group, on behalf of the House of Representatives] for the purpose of presenting arguments in support of the constitutionality of Section 3." Solicitor General's *Massachusetts Certiorari Petition*, *supra* note 132, at 12-13 n.3. The Solicitor General reiterated that "with the case now before this Court on this petition filed by the Executive Branch petitioners, it is appropriate for [the Bipartisan Legal Advisory Group] to present arguments in defense of the validity of the measure." *Id.*

Congress that the DOJ had determined that 38 U.S.C. §§ 101(3) and 101(31) (defining the “surviving spouse” of a veteran as only “a person of the opposite sex”<sup>373</sup>) are unconstitutional for the same reasons that DOMA is unconstitutional.<sup>374</sup> The sum total of these actions shows President Obama’s recognition of the importance of not simply predicting the Court’s actions, but also of influencing them. Judges are wary of constitutional challenges: “Invalidating a federal statute is an unwelcome responsibility for federal judges; the elected Congress speaks for the entire nation, its judgment and good faith being entitled to utmost respect.”<sup>375</sup> But when the time comes that that deference is misplaced, and it may continue to permit majoritarian tyranny, the President has a responsibility to help alert the courts that that deference is no longer warranted.

### CONCLUSION

The 1994 Dellinger framework for presidential nonenforcement of statutes applies equally well—and in some respects better—to Executive decisions not to defend statutes that the President believes to be unconstitutional. The degree of authority the President has under the Take Care Clause to make such decisions varies. But when the President believes that a statute is unconstitutional under equal protection principles, he has a heightened responsibility to consider alerting the Court to the statute’s constitutional defects, a task that he can accomplish through nondefense. The nondefense decision may encourage the Court to review a statute or government action under heightened scrutiny.

President Obama’s decision not to defend DOMA is a paradigmatic case of deliberative nondefense decisionmaking. Retrospectively applying the modified nondefense model to Obama’s determination reveals that he appropriately reflected on his duty under the Take Care Clause while simultaneously engaging in repeal efforts. President Obama then assessed Congress’s actual contemporaneous rationality in passing DOMA. In response to the specter of animosity inherent in Congress’s rationale, and the clarity of changed sociopolitical circumstances, President Obama appropriately concluded that classifications based on sexual orientation should receive heightened scrutiny and that advancing this argument would help courts reach the same conclusion.

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<sup>373</sup> 38 U.S.C. § 101(3), 101(31) (2006).

<sup>374</sup> Letter from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to John Boehner, Speaker, U.S. House of Representatives 2 (Feb. 17, 2012), *available at* <http://www.justice.gov/ag/boehner02-17-12.pdf>.

<sup>375</sup> *Id.*

In addition, by continuing to enforce DOMA while advancing exhaustive reasoning in litigation for its unconstitutionality, Obama has facilitated judicial resolution of the issue and respected the separation of powers. Implicit in Obama's decisionmaking, and the DOJ's following in the same vein, are some of the considerations not fully elaborated by the Dellinger/Johnsen framework: presidential nondefense decisions depend on the nature of the underlying constitutional values at stake. Those decisions, and the authority to make them, become weightier when the underlying value is equal protection threatened by majoritarian tyranny.